Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1995

Joyce H. Crandon, Petitioner
vs.
Frankie D. Dunnick
Commissioner of the Kansas Banking
Commission,
Individually, Respondent

On Petition For Writ of Certiorari
To the Supreme Court
of the United States

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a special assistant attorney general employed by the State of Kansas, Banking Commission as General Counsel can be fired for exercising of her First Amendment rights of Freedom of Speech, where she inquires about federal law and policy to the Regional General Counsel of the Federal Deposit Insurance Corporation [FDIC]?

Whether all attorneys lose their First Amendment right to freedom of speech when they accept employment for the State of Kansas?

Whether the Kansas Supreme Court erred in affirming the district court's granting summary judgment when there were disputed material facts?

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JURISDICTIONAL STATEMENT

Petitioner submits herewith the jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

The jurisdiction of this court is invoked under the provisions of 28 U.S.C. §1257 (3).

This is an appeal from the highest state court in the State of Kansas; the Supreme Court of the State of Kansas. That Court affirmed the District Court's Summary Judgment on the Petitioners cause of action filed in state court under 42 U.S.C. §1983. June 2, 1995 was the date of the judgment sought to be reviewed.

June 29, 1995 Notice of Appeal was filed with the Kansas Supreme Court.

Petitioner was granted an extension of time in which to file this brief until October 30, 1995 by the Clerk of the Supreme Court in a letter dated August 4, 1995: Re: Application No. A-106.

c. the statutory provision conferring jurisdiction on appeal: This appeal is taken pursuant to U.S.C. 28 §1257.

This case involves a federal question involving 42 U.S.C. §1983. A federal question in a civil action for deprivation of civil constitutional right of freedom of speech. In that Dunnick, Respondent, Kansas Bank Commissioner under color of state law caused a citizen of the United States to wit: Crandon, Petitioner, former General Counsel to the Kansas Banking Department and Assistant Attorney General of the State of Kansas, to be deprived of her rights and privileges secured by the United States Constitution i.e. her right to Freedom of Speech under the First Amendment.

STATUTE INVOLVED

U. S. Constitution, First Amendment:
42 U.S.C. §1983. Civil action for deprivation of rights
42 U.S.C. §1988. Proceedings in vindication of civil rights

IN THE SUPREME COURT
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Joyce H. Crandon, Petitioner
vs.

Frankie D. Dunnick,
Commissioner of the
Kansas Banking Commission,
Individually, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE UNITED STATES

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Joyce H. Crandon, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kansas entered in the above-entitled case on June 2, 1995.

STATEMENT OF THE CASE

Crandon files this petition for writ of certiorari, to review the final judgment of the Kansas Supreme Court. That Court affirmed the district courts granting of summary judgment in favor of the respondents, the State of Kansas and Frankie Dunnick, Kansas Banking Commissioner.

Crandon was an attorney and was employed as General Counsel of the State of Kansas Banking Department. Her employment began November, 1991. She was fired from her job on July 13, 1992 by the Respondent Frankie D. Dunnick [hereafter Dunnick] the Kansas Banking Commissioner. Dunnick had been appointed Commissioner by the Governor in March, 1991.

Judi Stork was the Deputy Bank Commissioner.

In May 1992, Review Examiner Berggren of the Kansas Banking Commission, came to Crandon with evidence that Deputy Bank Commissioner Stork and her spouse, Mr. Robert Stork, had personal loans (a car loan, home mortgage,) at state-chartered banks, the Baileyville State

Bank and the now defunct Southwest Bank & Trust of Topeka.

In Review Examiner Berggren's opinion, the loans were in possible violation of state and federal law, in particular of 42 U.S.C. §1983 as well as the Code of Federal Regulations. Review Examiner Berggren requested Crandon to review the matter and advise him accordingly.[1] [Berggren deposition p. 327-330.]

It is uncontroverted that one of Crandon's primary job duties was to "give legal advice and counsel to Review Examiners at the Kansas Banking Commission". [Dunnick deposition p. 2. exhibits] In reviewing the matter, Crandon consulted statutes, regulations and relevant cases. [Crandon deposition p. 350.] In addition, she obtained copies of Stork's home mortgage, auto registration,[2] and other information which confirmed the existence of loans. Crandon knew that Deputy Commissioner Stork had examined the Southwest Bank and Trust. [Crandon deposition p. 260.] The fact that Deputy Commissioner Stork had examined the Southwest Bank and Trust was not ever denied by Dunnick.

As part of the review and research of the matter, Crandon telephoned Regional General Counsel of the FDIC Lamberti, in June, 1992, to inquire about federal law, federal regulations, and related policies regarding extensions of credit to bank examiners and their spouses. [Crandon deposition p. 232.]

The FDIC and the Kansas Banking Department are co-regulators of state-chartered banks in Kansas. The FDIC and the Kansas Banking Department do alternate banking examinations, and on some occasions conduct joint examinations with respect to actions against banks located in Kansas.

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1 This is a petition for review from a summary judgment. There was no testimony by any witnesses. There is no transcript or record of any testimony. Therefore the plaintiff is citing discovery depositions and discovery documents.

2 All a matter of public record in the State of Kansas.

After one of the conversations with Crandon, Regional General Counsel of the FDIC Lamberti, spoke with someone in the Division of Supervision at the FDIC about his conversation with Crandon and her inquiries. [Lamberti deposition p.22.]

On Thursday, July 9, 1992, Dunnick and Deputy Commissioner Stork traveled to Kansas City to meet Ray Pritchett Regional Director of the FDIC to discuss action on several banks in Kansas. At that time Regional Director Ray Pritchett informed Dunnick that he had received inquiries from the Kansas Banking Department about the loans of a high ranking government official Deputy Commissioner Stork.

On Friday, July 10, 1992, Dunnick met with Review Examiner Berggren, who was thereafter removed as the Review examiner for the Baileyville State Bank examination;[3] which was in progess in June and July of 1992. Dunnick questioned Review Examiner Berggren, as to; who knew about the inquiry into Deputy Commissioner Stork loans? [Berggren deposition exhibit # 55.] Dunnick admitted that the revelation that Crandon and Berggren had called the FDIC with inquiries about Deputy Commissioner Storks loans made him furious and embarrassed. [Dunnick deposition p. 51-53.] Review Examiner Berggren was a classified civil service employee protected by Kansas Civil Sevice laws.

On Monday, July 13, 1992 Crandon was fired by Dunnick because of this communication with the Regional General Counsel of the FDIC. Crandon, 897 P.2d at 102 [Appendix p. 3.]

Crandon tried to discuss the matter of the Stork loans with Dunnick. He harshly responded, "don't mention Judi [Deputy Commissioner Stork], I've taken care of that." He stated that, "I know you've been talking to Eric [Review Examiner Berggren], I want you to know that no one goes over my head to the FDIC–it makes me look like I don't

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3 One of the banks that Deputy Commissioner Stork had a loan.

know what's going on." [Crandon deposition p. 2 exhibit notes.]

Dunnick then stated angrily "that if Crandon 'did anything' about this; that he knew people, had 'connections' and would 'make it hard on her' [Crandon]". Dunnick repeated twice; that if Crandon 'did anything' about the termination, she would "regret it." Then Crandon was handed a letter of termination. [Crandon deposition p. 2 exhibit notes.]

The Petitioner Joyce H. Crandon [hereafter Crandon] brought an action in the state district court in Kansas against the State of Kansas and Frankie D. Dunnick [Dunnick] as Commissioner in his official and individual capacities.

Crandon alleged violation of her First Amendment rights under 42 U.S.C. §1983 and statutory and common law whistle-blowing retaliatory discharge.

The state district court sustained the defendants' motion for summary judgment. Crandon appealed to the Kansas Supreme Court who affirmed the trial courts decision.

This is an appeal from the highest court of the State of Kansas.

Important to this case is the fact; that Dunnick, after receiving the trial courts decision, filed a complaint against Crandon with the Kansas Attorney Disciplinary Administrator. That office conducted a through investigation into the allegations against Crandon and found no probable cause that Crandon violated any of the Model Rules of Professional Responsibility for Attorneys. The complaint that Dunnick filed against Crandon was dismissed.

REASONS FOR GRANTING WRIT

ISSUE I. Whether a special assistant attorney general employed by the State of Kansas, Banking Commission as General Counsel can be fired for exercising of her First Amendment rights of Freedom of Speech, where she inquires about federal law and policy to the Regional General Counsel of the Federal Deposit Insurance Corporation [FDIC]?

I. a.) The decision of the Kansas Supreme Court in Crandon v. State of Kansas and Frankie Dunnick, 257 Kan. 727, 897 P.2d 92 (1995) conflicts with the decision of the United

States Supreme Court in Waters v. Churchill, 114 S. Ct. 1878, 128 L.Ed. 2d 686., ____ U.S. ___ (1994).
In Waters 114 S. Ct. at. 1889, the court stated;

> We agree that it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures. This is why we have often held some procedures--a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on--to be constitutionally required in proceedings that may penalize protected speech. See Freedman v. Maryland, 380 U.S. 51, 58-60, 85 S.Ct. 734, 738-740, 13 L.Ed. 2d 649 (1965) (government must bear burden of proving that speech is unprotected).

In Waters, 114 S. Ct. at 1886,

> We have never set forth a general test to determine when a procedural safeguard is required by the First Amendment--just as we have never set forth a general test to determine what constitutes a compelling state interest,. . . .we agree that some procedural requirements are mandated.

Id. at 1884-1890 ,

> (a) Absent a general test for deciding when the First Amendment requires a procedural safeguard, the question must be answered on a case-by-case basis, by considering the procedure's cost and the relative magnitude and constitutional significance of the risks of erroneous punishment of protected speech and erroneous exculpation of unprotected speech that the procedure involves. In evaluating these factors here, the key is the government employer's interest in achieving its goals as effectively and efficiently as possible.

Id. at 1886;

> . . . that courts must not apply the Connick test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. It is necessary that the decisionmaker reach its conclusion about what was said in good faith, rather than as a pretext; but it does

not follow that good faith alone is sufficient under the First Amendment.

Id. at 1886;

For government employee's speech to be protected, it must be on a matter of public concern and the employee's interest in expressing herself on the matter must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of public services it performs through its employees.

In Crandon, the Kansas Supreme Court ruled that Crandon's speech was a matter of public concern. Crandon, 897 P.2d at 98. [Appendix p. 11.]

In Waters, 114 S. Ct. at 1878 .

Government employees are often in the best position to know what ails the agencies for which they work; 'public debate may gain much from their informed opinions' Pickering at 1736; And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matter. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished. See. Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 2899.

In Waters, 114 S. Ct. at 1893, Justice Scalia states;

Government agencies are often the site of sharp differences over a wide range of important public issues. In offices where the First Amendment commands respect for candid deliberation and individual opinion such disagreements are both inevitable and desirable. When those who work together disagree, reports of speech are often skewed, and supervisors are apt to misconstrue even accurate reports. The plurality, observing that managers "can spend only so much of their time on any one employment decision" ante, at 1890, adopts a rule that invites discipline, rather than further discussion, when such disputes arise. That rule is unwise, for deliberation within the government, like deliberation about it, is an essential part of our "profound national commitment" to freedom of speech. A proper regard

for that principle requires that, before firing a public employee for her speech, management get its facts straight.

Further, Justice Scalia in Waters, 114 S. Ct. at 1900 stated,

> A First Amendment claimant need not allege bad faith; the controlling question is not the regularity of the agency's investigative procedures, or the purity of its motives but whether the employee's freedom of speech has been abridged. Justice Scalia would recharacterize employees' right to free speech as a more modest protection against "retaliatory" discharges, a protection that would not extend to those terminated for speech that was fully protected but incorrectly reported.

The Crandon court found that Crandon's speech was a matter of public concern and that Crandon was fired because of such speech. Crandon, 897 P.2d at 98. [Appendix p. 3.]

In Crandon, Dunnick did not use, reasonably reliable procedures to determine that the First Amendment did not protect Crandon's speech. Dunnick found out that Crandon and Review Examiner Berggren had made inquiries about federal ethics law on Thursday July 9, 1992 and Crandon was fired at 9:00 a.m. on Monday morning July 13, 1992. There was no reasonably reliable procedure to determine whether the First Amendment protected Crandon's speech. Crandon was fired in retaliation for her inquiries to the FDIC about federal law as it related to a high-ranking government official in the Kansas Banking Commission.

The Kansas Court found in Crandon that the plaintiff was fired for her communication with the FDIC. Crandon 897 P.2d at 94-98. [Appendix p. 3-4.]

It is important that Review Examiner Berggren was making phone calls seeking advice in reference to the Deputy Commissioner Stork matter as it related to the Baileyville Bank examination. Review Examiner Berggren called the FDIC for advice on a daily basis. This was not unusual or out of the ordinary for Review examiners to do so. The only difference in this instance was that the questions were about a bank partially owned by Deputy Commissioner Stork, a high-ranking government official. And that she had been

appointed to that position by Dunnick. [Berggren deposition exhibit # 55. p. 20-24.]

The Kansas Supreme Court states in Crandon 897 P.2d at 102-103. [Appendix p. 20.]

> "Plaintiff's position as chief counsel for the organization required a close working relationship with Dunnick. Dunnick relied on plaintiff for legal advice for his guidance and for the guidance of the organization and its employees. The organization's attorney has a responsibility to give advice when necessary to prevent or rectify unlawful or improper acts of the organization and its employees. This advice must be given by presenting the attorney's opinion to the proper person or persons in the organization who have the authority to correct the problems. A close relationship and need for trust are essential in an attorney's relationship with the organization. This, a wide degree of deference to Dunnick's decision to terminate plaintiff is appropriate when something occurs to disrupt that relationship and trust.

Let us analyze what the Court has ruled. Dunnick relied on Crandon for legal advice for the guidance of the organization and its employees. Review Examiner Berggren, a organization employee, had requested that Crandon give to him an opinion on an issue. This issue just happened to involve legal policies and a high-ranking Kansas government official that had been appointed to such position by Dunnick. On other occasions Crandon had been given issues to research and in which to give an opinion by a Review Examiner Berggren, without presenting the issue to Dunnick first.

Review Examiner Berggren had told Crandon that he had discussed the matter of the loans of the high-ranking government official with Dunnick. [Berggren deposition exhibit # 55.] That was the job of the head bank Review Examiner. It was the duty of the review examiners of the Kansas Banking Commission to communicate with the Commissioner on bank examinations issues. Review Examiner Berggren asked Crandon to research issues of federal ethics laws and policy. Crandon had called FDIC Regional Counsel Lamberti about questions of law about

other issues not involving a high-ranking government official and Crandon did not get fired for doing that.

If there is nothing iniquitous about Deputy Commissioner Stork's loans, why was Dunnick so concerned about Emery's defense attorney Ebert knowing about the loan? Dunnick asked Crandon "Did you ever tell Bill Ebert about the extensions of credit? A. No, I did not." [Crandon deposition p. 243.] [4]

Additionally on July 22, 1992, after Crandon's dismissal Dunnick addressed a memo regarding Examiner Activities at State Chartered Banks. In this memo he states: [Crandon deposition p.2 exhibit.]

> TO; Deputy, Assistant Deputy, Review Examiners, All Field Examiners
> FROM: Commissioner Dunnick
> Date: July 22, 2992
> RE: Examiner Activities at State Chartered Banks
> Over the past several months, it has come to my attention that two Banking Department employees have, in the past, had overdrafts in checking accounts held at state chartered banks. Although they appear to have been inadvertent, these overdrafts could be construed as loans and as such a prohibited activity for an examiner from this department. (Ethics policy 89-13).
> The individuals involved in these separate incidents have been counseled and/or reprimanded for what I consider to have been their failure to exercise good judgment. As a result, I consider the matter, in relation to these individuals, closed. The general issue of examiner involvement with state chartered banks, however, is an area which I believe warrants further discussion.

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[4] Note: Kansas Bank examiner Emery was fired by Dunnick for having a loan at a state-chartered bank. Emery appealed Dunnick's decision to the Kansas Civil Service Board for a due-process hearing.

If Deputy Commissioner Stork, a high-ranking government official had not violated the law or policy with her overdrafts; why did Dunnick issue this memo?

Let it be very clear that the only evidence the district court had or that the Kansas Supreme Court had that there was no violation were the self-serving words of Dunnick and witness Deputy Bank Commissioner Stork themselves. There never was any investigation by anyone into any of the questions that the Kansas Bank examiners had about the Deputy Commissioner Stork matter.

I. b.) The decision of the Kansas Supreme Court in Crandon 897 P.2d 92. (1995) conflicts with the decision of the United States Supreme Court in Connick v. Myers, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L.Ed. 2d 708.

The Kansas Supreme Court in its decision affirming the Shawnee County District Court's granting of summary judgment Crandon 897 P 2d. at 102. [Appendix p. 18.] states.

> "The balancing test is set forth in Connick v. Myers, 461 U.S. 138, 75 L.Ed. 2d 708, 103 S. Ct. 1684 (1983), and Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), and weighs an employee's First Amendment rights against the interests of the State as an employer in promoting the efficiency of the public services it performs through its employees.
>
> In Connick, an assistant district attorney was involved and the United States Supreme Court said: "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." 461 U.S. at 151-52. The Supreme Court held the discharge of the assistant district attorney did not offend the First Amendment.
>
> The Connick Court also held that whether an employee's right to speak on a matter of public concern outweighs the government employer's interest in effectively providing services is a question of law and is subject to de novo review. See 461 U.S. at 150 n.10.
>
> In Goffer v. Marbury, 956 F.2d 1045 (11th Cir. 1992), an attorney claimed wrongful discharge for

exercising First Amendment rights. The court used language we deem applicable to our case: "The existence or not of attorney-client relations also bears on whether there was present the 'close working relationship' referred to in Connick that gives rise to a 'wide degree of deference' to the employer's judgment. Connick, 461 U.S. at 151-52, 103 S. Ct. at 1692. Moreover, definition of Goffer's role with relation to defendants is prerequisite to addressing whether her speech so destroyed her effectiveness in that role that the government interest must prevail over her speech interest." 956 F.2d at 1051.

In Connick the Supreme Court reversed, holding that because Myers's speech was principally concerned with a private grievance rather than with a matter of public concern, it was not entitled to as much protection as the employees' speech in Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed. 2d 811, 88 S.Ct. 1731 (1968), and Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274. The Court's premise was that:

> The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. With regard to the speech that was not of public concern, the Court's position was that, absent very unusual circumstances, the federal Court's position was that, absent very unusual circumstances, the federal courts should not be reviewing personnel decisions.

With regard to the speech that the court considered to be of public concern, the court concluded that under the facts of the case, the district attorney's interest in maintaining the efficiency of the office outweighed Myer's free speech interest.

Crandon presents to this Court that the case at bar does have very unusual circumstances that Crandon prays this Court to review.

In Crandon, the Kansas Supreme Court found that Crandon's speech was a matter of public concern. Crandon 897 P 2d. at 102. [Appendix p. 11.] But, because Crandon did not first go the Dunnick, the head of the agency that the respondent could fire Crandon because of the principle in

Connick, about "maintaining the efficiency of the office outweighed Crandon's free speech."

I. c.) The speech in Crandon were inquiries about policy and law to a federal co-regulator: The Connick speech was "mini-insurrection" to the press.

The difference in Connick from Crandon, is that Connick's speech was described in the trial as 'mini-insurrection'. Connick's speech was to the press. The speech in Crandon was inquiries about federal law, regulations and policy to legal counsel for the FDIC, a co-regulator of the state-charted banks in Kansas. The speech in Crandon was inquiries, at the request of Kansas Review Examiner Berggren, to do research on FDIC ethics regulations and policy. [Crandon deposition p. 226-227.] Additionally Crandon was asking about Kansas real property laws as they relate to spouses and the Kansas Doctrine of Necessities for spouses. [Crandon deposition p. 226-228.] The Connick speech was private speech: The Crandon speech was a matter of public concern. Crandon 897 P 2d. at 102. [Appendix p. 11.]

Crandon speech was inquiries about federal law as those laws related to a high-ranking Kansas government official to the Regional General Counsel of FDIC Lamberti; and to the Kansas Review Examiner Berggren [Crandon deposition p. 166.] And it was well established that it was her job to give legal advice to the review bank examiners. [Dunnick deposition p. 2. exhibits] [Crandon deposition p. 166.]

Crandon was doing her job to give legal advice to Review Examiner Berggren. [Dunnick deposition p. 2.] She telephoned Regional Counsel for the Federal Deposit Insurance Corporation Gerald Lamberti to inquire about Federal law, regulations and policy regarding bank examiners, extensions and how they relate to spouses of bank examiners. Regional Counsel for the Federal Deposit Insurance Corporation Lamberti testified in deposition that that is part of what his job is. "We [FDIC] also render–give opinions, oral and written, both to the general public and to the Division of Supervision. The great bulk of those are in the deposit insurance area." [Lamberti deposition. p. 6.]

In the Kansas Supreme Court opinion Crandon 897 P.2d at 102-103, [Appendix p. 19.] the court states,

As we view the matter, plaintiff was discharged because she was general counsel for the Office of State Bank Commissioner. The head of the OSBC had been advised of Stork's possible violations, at least as to the bank audit, and had determined there was no violation. He attended a civil service hearing in which plaintiff put Stork on the witness stand to establish that she had not violated any federal or state laws and that no rules, regulations, or internal policies had been violated. Plaintiff argued to the hearing panel that Stork's testimony was that no violation had occurred.

For the Kansas Supreme Court to establish that the plaintiff Crandon "put Stork on the witness stand to establish that she had not violated any federal or state laws and that no rules, regulations, or internal policies had been violated" is an outrageous and a gross over-statement of the facts, over-broad, a mis-statement and a grievous error of law. The Kansas Supreme Court made this finding with no evidence; there was not one page of the transcript of the Emery Civil Service hearing before the trial court or the Kansas Supreme Court.

I. d.) There is no 'efficiency' of the Kansas Banking Commission that is more important than the General Counsel's right to make inquiries about federal laws, policies and regulations from a federal co-regulator the FDIC.
and:
I. e.) No Kansas state interest is more important than a citizen's First Amendment rights to make inquiries into federal law, policies and regulations.

In balancing the State's interests; is it in the best interest of the State of Kansas to protect and soothe the ego and pride of one of its governmental officials? Is Dunnick's embarrassment that it gave the appearance that he did not know what was going on in his own department [Berggren deposition exhibit # 55 p. 21-23.] a State interest, higher than Crandon's First Amendment rights to make inquiries about federal law to her respective legal counsel with a co-regulator? Crandon and Berggren had discussed legal issues and bank exam issues countless other times with their respective components of the FDIC without first discussing it with Dunnick, and that did not embarrass or peeve

Dunnick. Why must the same information go through Dunnick when it is about a high-ranking government official whom Dunnick had appointed to such high-ranking government position?

I. f.) There was no "close relationship and need for trust" that was destroyed by Crandon's inquiries into federal law from the FDIC.

The Court stated in Crandon 897 P.2d at 102-104; Crandon 897 P 2d. at 102. [Appendix p. 20.]

> Plaintiff's position as chief counsel for the organization required a close working relationship with Dunnick. Dunnick relied on Plaintiff for legal advice for his guidance and the for guidance of the organization and its employees. The organization's attorney has a responsibility to give advice when necessary to prevent or rectify unlawful or improper acts of the organization and its employees. This advice must be given by presenting the attorney's opinion to the proper person or persons in the organization who have the authority to correct the problems. A close relationship and need for trust are essential in an attorney's relationship with the organization. Thus a wide degree of deference to Dunnick's decision to terminate plaintiff is appropriate when something occurs to disrupt that relationship and trust.

Crandon, agrees with the Kansas Supreme Court that "a close relationship and need for trust are essential in an attorney's relationship with the organization". However, that is exactly what Crandon had with the Kansas Banking Commission. Crandon was doing an assignment to research federal ethics law as it related to a high-ranking government official in the Kansas Banking Commission, Deputy Commissioner Stork. Dunnick was embarrassed and angry when he found out that Review Examiner Berggren and Crandon had made inquires into the law from the FDIC. What is the trust that was violated?

What is the "close relationship and need for trust are essential in an attorney's relationship with the organization" that Crandon destroyed? These are the facts. 1.) Dunnick knew of the Deputy Commissioner Stork mortgage.

[Berggren deposition exhibit # 55.] 2.) Dunnick lied under oath at the he did not know about the Stork mortgage at the Emery Civil Service hearing. [Transcript of the Emery Civil Service hearing July 6, 1995 at page 54; plaintiff's discovery.]

Q. Okay. Are you acquainted with Judi Stork?
A. She is my deputy commissioner.
Q. What's her current position: Did you say deputy commissioner?
A. Yes, sir.
How long has she been deputy commissioner?
A. I appointed her approximately a year ago, I believe.
Q. Okay. do you know what her father does?
A. Yes. He's in the bank.
Q. Which bank?
A. Baileyville State Bank.
Q. Okay.
A. Of Seneca, Kansas, I believe that's the correct name.
Q. It is a state chartered bank, is it?
A. Uh hun.
Q. And it is under the jurisdiction of your office:
A. That's correct.
Q. And do you know if Miss Stork and her husband own real estate?
MS. CRANDON: Objection, this is beyond the scope of–
A. I mean they live in a house, you know.
Q. (BY Mr. Ebert) If I could be permitted to proceed, do you know if Miss Stork and her husband own real estate:
A. I assume they do.
Q. Okay. Do you know who holds the mortgage on that property?
A. I have no idea. I mean, I don't—
Q. Is it your testimony here before this board that you never– that you do not recall having any discussions with any individual or individuals regarding who holds the mortgage on that property in the past?
A. Why should I?
Q. Just asking you to answer the question, sir.
A. Not that I recall. I mean- - -

Q. That's something that you would recall, however, isn't it?
A. I would think so.
Q. Okay
A. I mean, I don't ask, you know, I don't ask employees where they bank or anything.
Q. You don't?

There may be an issue of a violation of trust, in the Kansas Banking Commission, but that trust was not violated by Crandon. It was Dunnick who lied under oath to that tribunal.

Dunnick knew of the Deputy Commissioner Stork home mortgage and he asked Review Examiner Berggren on Friday July 10, 1992 whether Berggren had told Emery's defense attorney about the Stork home loan.

"Erik said he did not talk with Emery's defense. Erik conveyed that it seemed to be a 'common knowledge' item among the field examiners." [Berggrens deposition exhibit # 55 Eric's notes; p. 22. Friday 7-10-92.]

Review Examiner Berggren had told Crandon that he had discussed the matter of the loans of the high-ranking government official with Dunnick. [Berggren deposition exhibit # 55.] That was the job of the Review Examiner, to discuss bank examination matters with Dunnick; that was not the duty of Crandon. Review Examiner Berggren asked Crandon to research issues of federal ethics laws. Crandon had called Regional Counsel for the Federal Deposit Insurance Corporation Lamberti about questions of law and policy about other issues; not involving a high-ranking government official and she did not get fired for doing that.

ISSUE II. Do all attorneys lose their First Amendment right to freedom of speech when they accept employment for the State of Kansas?

This case is important to the eight hundred thousand [804,000] citizens of the United States of American are licensed to practice law [according to the 1990 U.S. Census]. Ten point fifty-four percent (10.54%) of those practicing law are employed in government service; that is more than eight-thousand [80,000] attorneys working for federal, state and local governments. The Supreme Court of Oklahoma ruled in State of Oklahoma v. Porter, 766 P.2d 958,(1988);

> Foreclosing the right of an attorney to criticize the court is thus not only a burden on the speaker's First Amendment right but also upon the public's First Amendment right to hear what he has to say. Without question, foreclosing the public's receipt of speech concerning the governmental function of the courts forestalls the public's access to the thoughts of the very class of people in daily contact with the judicial system. [766 P.2d at p. 967].

If all legal inquiries must be censored by the head of the agency; Where is the check and balance on the high-ranking Kansas state governmental officials in the Kansas Banking Commission? Is that truly a governmental interest for the State of Kansas sufficiently imperative to justify an attorney's First Amendment rights, when the attorney was doing an assignment given to her by the State Banking Commission Review Examiner?

Id. at 958, an attorney criticized a U.S. District judge, that Supreme Court of Oklahoma stated in regard to that attorney's First Amendment Right of freedom of speech,

> Where prohibition is directed at speech itself, self-government, the State may prohibit speech only upon showing compelling interest which subordinates right of speaker to speak and public to hear speech. And if the State has compelling state interest to prohibit speech, means chosen to further interest of State in prohibiting speech must be narrowly tailored to avoid unnecessary abridgment of right of free speech.

II. a.) Crandon was fulfilling her duty as General Counsel to the organization by doing legal research on an issue that Review Examiner Berggren presented to her.

The Kansas Supreme Court in its decision affirming the Shawnee County District Court's granting of summary judgment Crandon 897 P 2d. at 102-104 [Appendix p. 21.] states:

> "The trial court in general held that an organization's general counsel has obligations different than those of other employees. In using the balancing test discussed below, an attorney's obligation (as general counsel) is first and foremost to the organization. The balancing test as applied

here includes the factors that general counsel reported a suspected violation or violations to an outside agency without first consulting with the head of the organization and that had she done so she would have learned that no violations had occurred. Whether plaintiff violated the Model Rules of Professional Conduct is not the determinative factor, and in fact a finding of no violation can be of no comfort to her.

Crandon was fulfilling her obligation to the organization i.e. Kansas Banking Commission by researching federal ethics laws and policy an assignment given to her by Kansas Bank Review Examiner Berggren. [Crandon deposition 268].

It must be made clear that Crandon was doing her job [Crandon deposition 167, 198.] She was inquiring about federal law and policy as it related to state bank examiners and a high-ranking governmental official. [Lamberti deposition p. 37.]

Review Examiner Berggren was calling the FDIC Review Examiners with questions of law. [Berggren deposition exhibit # 55.] Dunnick may have interrupted this as an internal investigation however that interpretation was incorrect. [According the Regional General Counsel for the FDIC Lamberti deposition p. 37.]

Q. Do you have any evidence that Joyce Crandon did not have a good faith belief when you were talking to her that she was reporting a violation of the law?

A. Do you– are you saying-- are you asking me did I think she was reporting a violation of Section 213 to me? [Lamberti deposition. p. 37.]

Q. (BY MR. GOTT) No. I'm asking you when she was telling you this, was she doing it in a good faith or did you feel that she was doing it in good faith? [Lamberti deposition. p. 37.]

MS. ULRICH: Doing what, reporting?

MR. GOTT: Yes, the reporting.

MS. ULRICH: I object to the form of the question. I don't think there's been evidence that there was a reporting or I don't think Mr. Lamberti has testified that he was reported to about anything. [Lamberti deposition. p. 37.]

A. Yeah, I– the good faith part I have no idea about. This was not reporting to me on anything. This was a typical conversation where my brain was being picked, I thought. What do you think about this, what do you think about that, was the tenor of conversation. This wasn't someone who was picking up the phone and saying this bank is cheating me on this or so and so is cheating me on that or– that wasn't the tenor of the conversation to my recollection. It was– what do you think about this: It wasn't a reporting of anything. [Lamberti deposition. p. 38.]

Crandon called FDIC Regional General Counsel Lamberti one time in June to discuss federal law 18 U.S.C. §213 and related policy. [Crandon deposition p. 232 and 240.] Crandon was "asking that was my question, whether proceeds of the loan--you know clear it up in my mind exactly more clear in my mind, and he made it more clear in my mind" [Crandon deposition p. 232-233.]

II. b.) The State of Kansas does not have an interest sufficiently imperative to justify restriction of the First Amendments rights of one of its special assistant attorney general's to question the federal authorities about federal law as it related to a high ranking governmental official in the Kansas Banking Commission.

Is the best interests of the citizens of the State of Kansas for an attorney, employed to give legal advice to bank examiners; be fired from her job because she made 'inquiries about federal law to the FDIC, a co-regulator of Kansas Banks but the facts supporting the inquiries were about a high-ranking government official? The Kansas Supreme Court discussed that the district court found that no reasonable attorney in plaintiff's shoes could perceive the conduct of the defendant [5]; as the basis for an out-of agency report at the time it was made. The trial court found that plaintiff's report was made with reckless disregard for

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5 Even though the courts uses the word defendant ; it was not Dunnick or the State of Kansas that Crandon was making inquires about .

its truth or falsity and that she released information which was confidential under the Model Rules of Professional Conduct. However, there was absolutely no evidence to support this finding.

The following is what Crandon knew: 1.) that Deputy Commissioner Stork had personally examined the Southwest Bank and Trust. [Crandon deposition p. 260.] 2.) That Southwest Bank and Trust was listed as the lien holder on the vehicle that Deputy Commissioner Stork drove to work every day and that Deputy Commissioner Stork was listed along with her husband as owner of the vehicle. This information she relayed to Regional General Counsel for the FDIC Lamberti when inquiring whether 18 U.S.C. §213 which prohibited bank examiners from getting loans from banks that they have examined. These are all of the facts are the truth supported by copies of documents that are a matter of public record in the State of Kansas.

It needs to be noted here that both Crandon, and Review Examiner Berggren sought advice and counsel from their respective components in the FDIC. Neither went to the top of the FDIC, to inform Pritchett, the Kansas Regional Director for the FDIC. Making inquires about banking issues was in the ordinary course of events for bank examiners. Many times the FDIC called the Kansas Banking Department with questions of law on various bank exams. [Berggren deposition exhibit # 55.]

Both Crandon and Berggren had made inquiries about banking laws and regulations to the FDIC before: [Berggren deposition exhibit # 55.] Why, did Crandon have to first consult with the head of the agency, on this occasion, or risk losing her job?

In balancing the State's interests; is it in the best interest of the State of Kansas to protect the ego and pride of one of its high-ranking governmental officials? Just because Dunnick was upset embarrassed and "peeved at Review Examiner Berggren and Crandon"; was that sufficient State's interest for the Kansas Supreme Court to affirm the trial courts granting summary judgment in the case at bar?

In Johnston v. Koppes 850 F.2d 594, Ninth Circuit, (1988), another case where a government lawyer brought a 42 U.S.C. §1983 action against department head alleging that the lawyer had been improperly

disciplined for asserting her First Amendment rights, the issue of material fact as to whether department head was justified in disciplining government lawyer for her exercise of First Amendment rights precluded summary judgment for department head on his claim of qualified immunity. Further the Johnson court ruled that the department head did not act in good faith in disciplining government employee for exercising her First Amendment right, though department head had sought advice of lawyer, where lawyer was a subordinate of department head, advice was sought after disciplinary action had been taken, and advice did not address employee's constitutional rights at 850 F.2d 596.

Further Id.,

> . . . the attorney for an agency attended a hearing which was "favorable to public funding for abortion". The department head was "embarrassed" by the attorney's presence. The department head 'disciplined' the attorney. Johnson the attorney filed the 42 U.S.C. §1983 cause of action in federal district court. Further that court ruled as to summary judgment that "the non-moving party prevails if that party makes "a showing" sufficient to establish the existence of the elements of her case on which she bears the burden of proof, citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Crandon has made such a showing establishing the existence of the elements of her case and she prays this court to accept her petition for writ and remand this matter back to the trial court for a trial on the merits.

> "Public employees may not be terminated on a basis which infringes upon the employee's constitutionally-protected interest in freedom of speech." Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 2896, 97 L.Ed.2nd 315 (1987); Connick v. Myers, 461 U.S. 138, 142, 103 S. Ct. 1684, 1687, 75 L.Ed. 2d 708 "the exercise of constitutional rights is well-established in the law, and any public official cannot bet the Court's indulgence in his ignorance." Perry v. Sidermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972).

The Court in Sidermann stated:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny benefit to the person on the basis that infringes his constitutionally-protected interest--especially his interest in freedom of speech. For if a government could deny a benefit to a person because of his Constitutionally-protected speech and associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with Constitutional rights is impermissible. Perry v. Sidermann. 408 U.S. at 597, 92 S.Ct. at 2697.

Crandon requests the Court to echo the Court's admonishment that "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana. 379 U.S. 64, 85 S.Ct. 209, 215-216, 13 L.Ed. 2d 1225 (1964). Further, Id.

> The Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of the First Amendment values', and is entitled to special protection.

N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 913, 120 S.Ct 3409, 3426, 73 L.Ed. 2d 1215 (1982); Carey v. Brown. 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed. 2d 263 (1980).

> Whatever differences exist about interpretation of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner which government is operated or should be operated, and all such matters relating to the political process Mills v. Alabama, 384 U.S. 218-219, 86 S.Ct. at 1436-37. See also Arnett v. Kennedy, 416 U.S. 134, 228, 94 S.Ct. 1633, 1680 40 L.Ed. 2d 15 (1974)

(Marshall, J. dissenting) (Describing "the importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of misconduct of their superiors. . . . ") Connick v. Myers 461 U.S. at 162, 103 S.Ct. 1684.

II. c.) The elements for cause of action under 42 U.S.C. § 1983 are stated.

In citing Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, the Tenth Circuit in Johnson v. Independent School District No. 3, 891 F.2d 1485 (10th Cir. 1989), set forth the elements an employee must show to sustain a claim that her public employer violated her rights of free speech:

> The Supreme Court in Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed. 2d 471 (1977), set out a three-pronged test to determine whether an adverse employment decision violates a public employee's First Amendment right to free speech. Under that test a public employee must first show that, as a matter of law, his or her speech was constitutionally protected. Id. at 284, 97 S.Ct. at 574. Second, the employee must demonstrate that the protected speech was a substantial or motivating factor in the adverse employment discussion. Id. at 287, 97 S. Ct. at 576. Finally, the burden shifts to the employer to show by preponderance of the evidence that the employer would have made the same decision even in the absence of the protected speech. Id.
> Johnson v. Independent School, 891 F.2d at 1489-1490. See also Powell v. Gallentine, 992 F. 2d 1088 (10th Cir. 1993); Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989); Conoway v. Smith, 853 F.2d 789 (10th Cir. 1988).

The right to make statements critical of public officials has long been recognized as protected under the First Amendment. Wulf v. City of Wichita, 644 F.2d 842 (10th Cir. 1989). The federal district court in Wulf at p. 842 [a case from the federal district court in Kansas] stated:

> An employee who accurately exposes rampant corruption in her office no doubt may disrupt and

demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office. Porter v. Califano, 592 F.2d 770, 773-74 (5th Cir. 1979). If a public employee were to be deprived of the right to make critical statements about the manner in which governmental agencies were operated because of fear of provoking the dismissal, the public would be deprived of valuable information with which to evaluate the performance of its officials, whether elected or appointed. Protecting the dissemination of such information is an essential function of the First Amendment. Connick v. Myers, 103 S. Ct. at 1702 (Brennan, J., dissenting).

The Kansas court correctly found that the speech of Crandon, with the FDIC and State Banking Department Review Examiner Berggren were matters of sufficient public concern. Crandon 897 P 2d. at 98. Crandon's speech concerning public official crimes, misconduct and impropriety are considered "public" concern as a matter of law.[6] Conoway 853 F.2d at 796. Likewise, the Kansas court properly concluded that, although based upon disputed facts, sufficient evidence was presented that her speech was a motivating factor for her termination. Crandon 897 P 2d. at 98.

No evidence was produced to support the Kansas court's Pickering balancing test decision.

The third element in a public employee's First Amendment case is that the court must balance the interest of the employee in making the statement against the public employer's interest in the efficient and effective fulfillment of its responsibilities to the public. Pickering v. Board of Education, 391 U.S. 563, 568,, 88 S.Ct. at 1731, 1734, 20k L.Ed. 2d 811 (1968). Johnson v. Independent School, 891

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6 Respondent may erroneously argue that Crandon's speech is not protected, alleging factual error , that her conclusions were wrong. Powell, 991 at 1091. Crandon's speech is protected irrespective of whether her statements were true or false. Id., citing Pickering, 391 U.S. 578-82, 88 S.Ct. at 1740-42.

F.2d 1489-90. The district court erred in making its Pickering balance determination without evidence as to the effect, if any, of Crandon's speech. Powell, 992 F.2d at 1091, citing Conoway, 853 F.2d at 797, and Melton, 879 F.2d at 716.

II. d.) Dunnick, respondent is unable to establish Pickering balance in their favor as a matter of law.

The record is silent of any evidence that Crandon's speech had a disruptive effect upon the efficient and effective operation of the Kansas Banking Commission and it's ability to provide services to the public. How could Crandon's speech have had a disruptive effect upon the efficient and effective operation of the Kansas Banking Commission and it's ability to provide services to the public? Dunnick found out on Thursday and fired Crandon the following Monday morning? "Only when citizens advocate imminent, lawless action can the state lawfully intervene to suppress political dissent", see Brandenburg. v. Ohio, 395 U.S. 444, 447 (1969).

The Kansas court relies on supposition to determine that the balance weighed in favor of Crandon's termination. Its erroneous conclusion that the information exchanged with the FDIC and Berggren was confidential and in contravention of the attorney-client privilege is the genesis of the district court's ill-conceived conclusion. Goffer v. Marbury, 956 F.2d 1045 (11th Cir. 1992) (breach of attorney-client privilege, if any, only a factor and does not override free speech.). As demonstrated earlier, Crandon had no attorney-client relationship with Deputy Commissioner Stork, the information was not confidential to the Kansas Banking Commission or breach in attorney-client privilege. Without evidence of actual disruption of the Kansas Banking Commission services, the respondent loses the Pickering test as a matter of law. Powell, 992 at 1091.

Dunnick is unable to meet its high burden of showing that Crandon's termination and subsequent restriction is necessary to prevent actual disruption in the official functions or to ensure the effective performance of the Kansas Banking Commission to the public. Powell, 992 F.2d at 1091. See also Wren v. Spurlock, 798 F.2d 1313, 1318 (10th Cir. 1986); Schalk v. Gallemore, 906 F.2d 491, 494 (10th Cir. 1990). This Court must find the employer's action

unconstitutional unless the employer demonstrates in the record that the action was necessary to the effective performance of the employer or the employee. Luethje v. Peavine School District of Adair County, 872 F. 2d 352, 355 (10th Cir. 1989); Ware v. Unified School Dist. No. 492, 881 F.2d 906, 910 (10th Cir. 1989). Mansour v. Abrams, 151 Misc. 2d 121, 573 N.Y.S. 2d 364 (1991) (assistant attorney general criticism of internal policies states cause of action and defeats summary judgment).

It is not sufficient for Dunnick or the Kansas Supreme Court to allege or suppose that "some disruption" will occur. Schalk v. Gallemore, 906 F.2d at 496. The Gallemore court acknowledged that such arguments have some appeal. Id. However, the Kansas Supreme Court commits reversible error without compelling the State to demonstrate undisputed material facts that show "actual evidence" of the disruption and impact on the Kansas Banking Commission. Powell, 992 F.2d at 1091; Gallemore, 906 F. 2d at 496. Dunnick discovered that Crandon had spoken with and made inquiries with the FDIC on Thursday, July 9, 1992, and she was terminated the following Monday. No such evidence can exist.

The difficulty, and flaw, if you will, with the Kansas Supreme Court's conclusion that Crandon's speech is an impairment of the Kansas Banking Commission's "effective and efficient fulfillment of its responsibilities" is that there is no evidence to support the court's determination. Its guesswork that the relationship between Crandon and the Kansas Banking Commission would be damaged is of no moment. City of Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed. 2d 398 (1987):

> If absolute assurance of tranquillity is required, we might as well forget about free speech. Under the requirement, the only "free" speech would consist of the platitudes. That kind of speech does not need Constitutional protection.

City of Houston, 107 S.Ct. at 2510, F. N. 11 (quoting Spence v. Washington, 418 U.S. 405, 416, 94 S.Ct. 2727, 2733, 41 L.Ed. 2d 842 (1974) (Douglas, J., concurring).

Likewise, bald conjecture of breaches of loyalty and confidence, particularly without reference to the record, do

not support the Pickering balance in favor of the defendants.

Crandon respectfully submits to this Court that the respondent failed to affirmatively set forth the evidence sufficient to demonstrate that the Pickering balance weighs in their favor as a matter of law. Powell, 992 F.2d at 1091. Moreover, the Kansas Supreme Court cannot rely upon its own supposition in argument to support the Pickering balance. As such, under controlling authority this Court should remand the action back to the Shawnee County District in Kansas for a trial on the merits with the holding that Crandon prevails on the Pickering balance as a matter of law.

The court states that factors that general counsel reported a suspected violation or violations to an outside agency without first consulting with the head of the organization and that had she done so she would have learned that no violations had occurred. That is not what the evidence produced at discovery That is not what discovery revealed in the case at bar. Even FDIC Regional General Counsel Lamberti stated that "I frankly don't know. I mean I don't know about enough of the facts of the situation to have an opinion one way or the other. . . "
[Lamberti deposition. p. 6.]
Lamberti was asked by Dunnick;

> Q. Would that regulation apply to the situation Ms. Crandon described to you at the Bank Commissioner's office?
>
> A. I frankly don't know. I mean I don't know about enough of the facts of the situation to have an opinion one way or the other. . .

However when Regional General Counsel for the FDIC Lamberti was questioned and given more of the facts by counsel for the plaintiff in his depositions he stated,
[Lamberti deposition p. 36.]

> Q. (BY MR. GOTT) Okay, Mr. Lamberti, and that's fair enough and I'll do that. You have a family owned bank and the supervisor is connected with that bank and one of the siblings who is with that bank and one of the siblings who is working in that bank contacts the supervisor and expresses concern that the supervisor's subordinates, i.e. the field examiners, are examining her

loan or his loan and the field examiner is promptly removed from that examination. Would you find anything improper with that?
MS. ULRICH: Again, I object the form of the question. There's no foundation. Those facts are nowhere in evidence in this deposition or in this case.
A. Would I find anything wrong with it?
Q. (BY MR. GOTT) Yes.
A. Yeah, it sounds to me like there's something going on here that maybe needs to be looked into, but I don't think it's a violation of Section 213, if that's what you're asking me.

ISSUE III. Whether the Kansas Supreme Court erred in affirming the district court's granting summary judgment when there were disputed material facts?

Material issues of fact preclude district court from ruling Crandon used poor judgment and did not take steps available to her that a reasonable prudent attorney would have taken prior to inquiring about what she suspected to be violations to the FDIC. "Reasonable" is a question of fact for the jury to decide.

The Kansas Supreme Court opinion continues at Crandon 897 P 2d. at 102-104 [Appendix p. 21].

> The OSBC head then attended a meeting with FDIC officials involving other matters and he learned for the first time that plaintiff had twice reported possible violations (once prior to the civil service hearing and a second time either immediately preceding or immediately after the panel hearing, based on largely different facts) to the FDIC without checking facts that were available to her which would have changed a reasonable attorney's mind. Whether the second reporting by plaintiff to the FDIC occurred before or after the panel hearing is not clear. The panel hearing was held on July 6 and the second telephone call reporting the alleged violations occurred (according to plaintiff's testimony) the first week in July.

A question for this tribunal--How can the Kansas Supreme Court determine on summary judgment 'what facts would have changed a reasonable attorney's mind'? How can any tribunal determine what facts would change a

reasonable attorney's mind without a hearing by a trier of facts to determine what all the facts were to a "reasonable attorney's mind"? This is a factual issue for the jury to decide.

There are disputed facts as to the issue of whether Crandon knew that Deputy Commissioner Stork had examined Southwest Bank and Trust. Crandon stated in depositions that she did know this. [Crandon deposition p. 260.] That Deputy Commissioner had examined Southwest Bank and Trust was never denied by Dunnick. It is uncontroverted that Deputy Commissioner Stork examined Southwest Bank and Trust; yet the Kansas Supreme Court states in Crandon, 897 P.2d at 98. [Appendix p. 9-10.] "Plaintiff proffers no evidence existing at the time of her report to support her assertion that Stork had unlawfully examined the Southwest Bank and Trust." These are disputed material facts.

Pursuant to Celotex v. Catrett 106 S.Ct. 2548, 91 L.Ed. 2d 265, 477 U.S. 317 (1986), the Court, held that:

> (1) Rule 65 (c) mandates the entry of summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case as to which that party will bear the burden of proof at trial; (2) there is no requirement that moving party support its motion with affidavits or other similar materials negating the opponent's claim; and (3) nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment.
>
> Additionally pursuant to Celotex, "Where party will have burden of proof on an element essential to its case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmovant's case necessarily renders all other facts immaterial.

Crandon has come forward with a prima facia case sufficient to be entitled to present her case to a jury.

Crandon has demonstrated that there the Kansas Supreme Court affirmed the district's court summary judgment based on an opinion that conflicts with Waters, supra and Connick, supra.

Additionally the plaintiff has demonstrated that summary judgment was granted based on disputed material facts. Only a trial to a jury will bring out all the facts in this important case for all attorneys in government service.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted

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Kansas Supreme Court # 08914
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Wichita, KS 67202-1816
316-263-0505

Dated this 28 day of November, 1995.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 71,138

JOYCE H. CRANDON,
Appellant,

v.

STATE OF KANSAS, KANSAS BANKING COMMISSION,
and FRANKIE D. DUNNICK,
Appellees.

SYLLABUS BY THE COURT

1.

Attorneys have an employee-employer relationship different than that of other employees, and their conduct is measured by a different standard.

2.

The balancing test set forth in *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), and *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), weighs an employee's First Amendment rights against the interests of the State as an employer in promoting the efficiency of the public services it performs through its employees.

3.

When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgement is appropriate. The existence of an attorney-client relationship also bears on whether a close relationship which gives rise to a wide degree of deference to the employer's judgement is present.

4.

Whether an employee's right to speak on a matter of public concern outweighs the government employer's interest in effectively providing services is a question of law and is subject to de novo review.

5.

Defining an attorney's role with an organization is prerequisite to addressing whether the attorney's speech on a matter of public concern so destroyed the attorney's effectiveness in that role that the government interest must prevail over the attorney's speech interest.

Appeal from Shawnee district court; FRANKLIN R. THEIS, judge. Opinion filed June 2, 1995. Affirmed.

Alan L. Rupe, of Rupe & Girard Law Offices, P.A., of Wichita, argued the cause, and *Thomas L. Steele*, of the same firm, was with him on the briefs for the appellant.

Carl A. Gallagher, assistant attorney general, argued the cause, and *Nancy L. Ulrich*, assistant attorney general, and *Robert T. Stephan*, attorney general, were with him on the brief for the appellee.

Mark F. Anderson, of Topeka, was on the brief for *amicus curiae* The Disciplinary Administrator of Kansas.

Jim Lawing, of Wichita, was on the brief for *amicus curiae* American Civil Liberties Union of Kansas.

The opinion of the court was delivered by

ABBOTT, J.: Plaintiff Joyce Crandon brought this action after she was discharged from her position as general counsel for the Office of the State Banking Commissioner (OSBC). Plaintiff had reported to the FDIC alleged violations of federal and state law

committed by the Deputy Commissioner, Judi Stork. Plaintiff alleged a common-law whistle-blowing retaliatory discharge claim, a claim for violation of K.S.A. 1994 Supp. 75-2973, and a 42 U.S. C. § 1983 (1988) claim for violation of her First Amendment right to free speech. Plaintiff later sought to amend her complaint to include a free speech retaliatory discharge claim. The trial court granted the defendant's motion for summary judgment. Plaintiff appealed, and the case was transferred to this court from the Court of Appeals.

The trial court found the following undisputed facts:

> "Ms. Crandon carried the title of general counsel to the office of the state bank commissioner [defendant Dunnick] and had the status of an assistant attorney general. She began upon her duties on November 18, 1991. Her position was in the unclassified civil service. See, K.S.A. 75-3135; K.S.A 75-2935(1)(j) and (m). As such, she had no tenure and was an 'at will' employee. Compare, *Riddle v. City of Ottawa*, 12 Kan. App. 2d 714, 716-19 (1988), pet. rev. den., 243 Kan. 780 (1988).
>
> "...[I]t is the state bank commissioner who has the principal authority under K.S.A. 9-1701 et seq. to execute the laws and to examine and regulate banks.
>
> "...The state bank commissioner is appointed by the governor and confirmed by the State Senate. It is the bank commissioner's duty to administer the state's banking laws.... Further authorized is a deputy commissioner appointed by the commissioner. The Deputy Commissioner is in the unclassified civil service and enjoys no tenure, but serves at the pleasure of the state bank commissioner. See, K.S.A. 75-3135.
>
> "The remaining staff of the agency, exclusive of clerical personnel, consists of individuals holding office and authority as 'examiner's whose duties involve actual performance of, or supervision of, examinations of state chartered banks. All these personnel, as well as clerical staff, hold positions in the state classified civil service system,

meaning they are not subject to dismissal without cause. See, K.S.A. 75-3135; 75-2935(2).

"It was the duty of Ms. Crandon to act as the legal advisor to, and attorney for, this agency. Beginning approximately April to May 1992, one of the review examiners, Erik Berggren, became aware that the Deputy Commissioner, Judi Stork, who had held appointment in the agency since 1981, first as an examiner and subsequently, at the time in question, in the position of deputy commissioner, could be considered to have existing loans from two state charted banks, the State Bank of Baileyville, also a bank in which her financial disclosure statement filed pursuant to K.S.A. 46-247 et seq. disclosed she had a 'substantial interest', and from the Southwest Bank and Trust in Topeka.

"One loan from the State Bank of Baileyville consisted of a note signed only by her husband, but the resulting mortgage on her home was signed by both [her] and her husband. Other loans consisted of a series of overdrafts on a personal checking account she held with that bank. Another loan existed at the Southwest Bank and Trust upon which, although Mrs. Stork was not a signatory to the loan documents, the collateral, a car, was titled in the name of she and her husband, he being the sole signatory on the loan. For the purposes here it is not necessary for the court to determine whether, in fact, Mrs. Stork was a loan recipient in each circumstance, however, for the purpose of defendants' motion the court shall presume in each instance she was a loan recipient.

"...Mr. Berggren believed that such loans placed Mrs. Stork not only in violation of the agency's own internal written ethics code, but also constituted a violation of state and federal banking laws.

"In this regard, K.S.A. 9-1701(a) provides:

> 'the commissioner or the commissioner's assistant or examiners shall visit each bank and trust company at least once every 18 months, and may visit any

bank or trust company if the commissioner deems it necessary, for the purpose of making a full and careful examination and inquiry into the condition of the affairs of such bank or trust company. For such purpose the commissioner, the commissioner's assistant and examiners are authorized to administer oaths and to examine under oath the directors, officers, employees and agents of any bank or trust company. Such examination shall be reduced to writing by the person making it and such person's reports shall contain a full, true and careful statement of the condition of such bank or trust company. The commissioner in lieu of making a direct examination and inquiry may accept the examination and report of an authorized federal agency. The commissioner shall provide to the board of directors of the bank or trust company a copy of the examination report written by the state examiners. Neither the commissioner, the commissioner's assistant nor any examiner shall examine any bank or trust company in which the person making such examination is a stockholder or is otherwise financially interested or to which bank or trust company or any officer thereof the person making the examination is indebted.' (Emphasis supplied.)

"Also noted is 18 U.S.C. 213 which provides: 'Whoever, being an examiner or assistant examiner of member banks of the Federal Reserve System, financial institutions the deposits of which are insured by the Federal Deposit Insurance Corporation, which are branches or agencies of foreign banks (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978 [12 USCS Sec. 3101(1), (3)]), or which are organizations

operating under section 25 or section 25(a) of the Federal Reserve Act, or a farm credit examiner or examiner of National Agriculture Credit Corporations, or an examiner of small business investment companies, accepts a loan of gratuity from any bank, branch, agency, corporation, association or organization examined by him or from any person connected therewith, shall be fined no more than $5,000 or imprisoned not more than one year, or both; and may be fined a further sum equal to the money so loaned or gratuity given, and shall be disqualified from holding office as such examiner.' (Emphasis supplied.)

"Further, to be noted, as it will be addressed subsequent, is 12 U.S.C. 1289, as amended, as here relevant:

'(a) Prohibition

(1) In general

Except with the prior written consent of the Corporation--

(A) any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or money laundering or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, may not--

(i) become, or continue as, an institution-affiliated party with respect to any insured depository institution;

(ii) own or control, directly or indirectly, any insured depository institution; or

(iii) otherwise participate, directly or indirectly, in the conduct of the affairs of any insured depository institution';

"Further, in reference to the above statute, the phrase 'institution affiliated party' is defined in 12 U.S.C. 1813(u), as here relevant as follows:

'(1) any director, officer employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution;

...

(3) any shareholder (other than a bank holding company), consultant, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case -by-case) who participates in the conduct of the affairs of an insured depository institution;

...

"Subsequent, probably in April to May or June 1992, Mr. Berggren first brought his concerns to Ms. Crandon's attention. Further, this underlying factual situation concerning Mrs. Stork became a part of a civil service hearing in a termination proceeding initiated by the Commissioner regarding an employee (not related to this case) that had been appealed by the employee examiner to the state civil service board at which Ms. Crandon appeared in defense of the agency action. The employee had been terminated based on her conviction for violating 18 U.S.C. 213. The issue at note arose from an apparent 'what's good for the goose is good for the gander' defense claiming that Mrs. Stork had loans with the state chartered banks and she was not terminated. The terminated employee was reinstated by the civil service board. This hearing was on July 6, 1992. Ms. Crandon had argued before the Kansas civil service board that Mrs. Stork was not in violation of any such laws and the circumstances were not comparable...

"Mrs. Stork's circumstance was also raised by state bank examiners as a part of the regular examination of the State Bank of Baileyville on going circa this same period. At one point in June 1992, and again the week of July 6, 1992, Ms. Crandon made, on each occasion, a phone inquiry to the Federal Deposit Insurance Corporation regional office in Kansas City, specifically, to Mr. Lamberti, its regional counsel, whether in his view Mrs. Stork's

circumstances were in violation of federal law, specifically 18 U.S.C. 213. Mr. Lamberti subsequently has testified that he did not perceive a violation, but that such an issue was an internal one for the state agency. Admittedly, he said his response was ad hoc and without research. Notwithstanding, in considering defendants' motion the court will consider Mr. Lamberti's response as sufficiently ambivalent such that plaintiff might believe his response at least left a question raised as to the violation of federal law.

"Sometime during the week of July 6, 1992, Ms. Crandon advised Mr. Berggren to turn the matter over to the FDIC, which he did. Mr. Berggren has testified he would have done so in any manner notwithstanding any advice of Ms. Crandon.

"Subsequently, and for the purpose of the motion and taken as true, Commissioner Dunnick learned at a meeting with the FDIC on July 9, 1992, of Mr. Berggren's reporting to the FDIC, Ms. Crandon's advice to him to do so, and her inquires to Mr. Lamberti.

"At no time prior to her termination, except during questioning at the civil service hearing on July 6, 1992, had Mrs. Stork and Mr. Dunnick were called as witnesses, had Ms. Crandon personally talked with Mr. Dunnick or Mrs. Stork about Mrs. Stork's status vis a vis the identified loans and whether Mrs. Stork's loan circumstances violated federal or state banking laws, state ethics statutes, or internal agency ethics policy.

"At no time prior to Ms. Crandon's termination did Ms. Crandon attempt, in any manner, to persuade Mr. Dunnick, as the agency's head, that he should affirmatively act in some fashion under his authority as Commissioner to remedy the situation she believed was presented arising from the fact of Mrs. Stork's loans.

"Ms. Crandon asserted through counsel at oral argument in this case that she made one phone call to the attorney general's office and was told they don't give opinions on criminal matters. The person called is not identified.

"There is no evidence Ms. Crandon contacted any member of the banking board or the Governor's office before her termination.

"For the purpose of the motion, it is assumed Mr. Berggren told Ms. Crandon that he had discussed the loans with Mrs. Stork and that he had brought them to the attention of Commissioner

Dunnick who said he would look into it. The conversations between Berggren, Stork, and Dunnick probably occurred prior to May 27, 1992.

"Whether Ms. Crandon knew Mrs. Stork had told Mr. Berggren she had never had authority to examine the State Bank of Baileyville since she first came to the agency or that Mrs. Stork had closed her checking account at the State Bank of Baileyville is unclear. However, she did not know that Mrs. Stork had replied to the inquiries by memo to the commissioner. Notwithstanding, these facts could have been confirmed by agency documents or official inquiry to the bank. Ms. Crandon did not see these documents and the response of Mrs. Stork to inquiries posed to her as to her authority to examine the State Bank of Baileyville when she was a witness, under oath, in the Emery civil service hearing were that she had no such authority. Ms. Crandon knew from Mr. Berggren that Commissioner Dunnick had reviewed the matter by June 1, 1992, and had concluded Mrs. Stork's situation violated no state policy, but she did not know the basis for his decision except for what she may have learned at the civil service hearing.

"Further, no evidence has been proffered by the plaintiff that she had any other source of factual information to form any opinion that Mrs. Stork's loans were in violation of any law or policy other than by talking to Mr. Berggren or to Mr. Lamberti, except to confirm by inspection at the Record of Deeds' office that the ownership of the property and the mortgage on it to the State Bank of Baileyville was in both Mr. And Mrs. Stork's name and to confirm title to the motor vehicle subject of the loan and lien of Southwest Bank and Trust was likewise in their names. Plaintiff is unable to say what, if any, case law she reviewed prior to any advice to Mr. Berggren or used in the formulation of any opinion of wrongdoing other than *St. Francis Hospital v. Browles*, 251 Kan. 334 (1992), which explains the doctrine of necessaries vis a vis one's spouse's liability for the debts incurred by the other. The statutes or regulations upon which she stated she relied were K.S.A. 9-1701, 12 U.S.C. 213, 12 U.S.C. 1289, and 12 C.F.R., part 215.

"Plaintiff proffers no evidence existing at the time of her report to support her assertion that Mrs. Stork had unlawfully

examined the Southwest Bank and Trust or interfered with the examination of the State Bank of Baileyville. Ms. Crandon did state she believed Mrs. Stork had authority to examine any Kansas bank. Ms. Crandon states she investigated whether Mrs. Stork was in violation of 12 U.S.C. 1289 by examining Case 82 CR 234 in the Shawnee County District Court and Mrs. Stork's disclosure of substantial interest statements filed with the Secretary of State, but did not discuss with anyone, but Mr. Berggren, whether Mrs. Stork's prior diversion agreement placed her in violation of federal law because she had an ownership interest in the bank. She undertook no other investigation nor inquiry. There is no evidence the subject matter of her 12 U.S.C. 1289 inquiry was part of any 'whistle-blowing' claim or that Mr. Dunnick knew of it, however, it is accepted by the court as advanced as one motivation by Ms. Crandon for her 'reporting' activity and procedure. Of course, factual information arising after 'reporting' would not be a proper standard to test the reasonableness of her belief at the time of reporting.

"It seems substantially clear and not reasonably subject to material dispute what Ms. Crandon's 'whistle-blowing' and/or 'free speech/public concern' communication claim is alleged to be. It consists of up to two inquiries to Mr. Lamberti of the FDIC concerning loans made to a spouse of what Ms. Crandon represented was a deputy commissioner or 'supervisory examiner' and, for the purpose of this matter, further inquiries and reporting of the circumstances concerning such loans to the FDIC by Erik Berggren which, though encouraged by Ms. Crandon, Mr. Berggren would have proceeded on in such manner in any fashion.

"The plaintiff's claim is that she was terminated by her employer, the state bank commissioner, for this collective 'reporting' to the FDIC."

Defendants moved for summary judgment on all of plaintiff's claims. The trial court granted the defendant's motion. Resolving disputed facts in plaintiff's favor, as the court was required to do, the court found that but for plaintiff's acts of communication to the FDIC, she would not have been terminated. The court also assumed that Commissioner Dunnick was aware of the communications. Central to plaintiff's claims, the court found, was the issue whether the communications were legally protected under the circumstances so as to insulate plaintiff from termination, as issue of law.

In evaluating the issue, the trial court found that the plaintiff had spoken on a matter of public concern. However, the court found that the flaw in plaintiff's claim was based on uncontroverted facts. first, she was the attorney for the agency whose employee was "reported" upon. The knowledge plaintiff had was derived from her position as the OSBC's attorney. She took no steps to present her concerns to the OSBC's head, Commissioner Dunnick, who had the authority to act against the employee alleged to be violating the law. The court found that plaintiff's reporting was contrary to the Model Rules of Professional Conduct (MRPC), adopted by this court in Supreme Court Rule 226 (1994 Kan. Ct. R. Annot. 286), and that there was no justification for plaintiff's failure, as the OSBC attorney, to approach, counsel, and advise Dunnick on the issue. Moreover, the court found that plaintiff proceeded on her course of conduct without more than a second-hand knowledge of the facts rather than relying on her own independent investigation. She did not report the full facts to her FDIC contact, Mr. Lamberti, because she did not know the full facts, including whether Stork had ever examined the Southwest Bank and Trust or personally participated in the examination of the State Bank of Baileyville.

The trial court further found that the statutes thought to have been violated by Stork, 18 U.S.C. § 213 (1988) and K.S.A. 9-1701(a), were not applicable unless Stork had in fact examined either of the banks in question or had interfered in or passed upon a matter in the examination of the banks. The court also found that whether Stork had violated 12 U.S.C. § 1829 (1988), which prohibits a

person who has entered into a diversion agreement from being involved in a financial institution without prior approval by the FDIC, was irrelevant because the prior diversion was not reported to the FDIC by plaintiff; the court further found that even if the claim was relevant, plaintiff never determined whether Stork had obtained written permission from the FDIC and there was a question whether the statute applied to Stork's minimal ownership interest (a 4.9% share of stock in a bank holding company that owned the State Bank of Baileyville).

The trial court held that to establish a whistle-blowing claim, plaintiff must establish that a reasonable person in her shoes, an attorney, would believe that a violation of law or matter of public concern existed and that the whistle-blowing was made in good faith and not for a corrupt or otherwise specious motive. The court found both a lack of good faith and a lack of good motive based on plaintiff's avoidance of a professional duty to her clients and her rush to judgment on supposition and surmise. Moreover, if the information was confidential when communicated because of the omission of a duty to a client or the lack of consultation with the client, the communication would grossly undermine the working relationship between the client and attorney and the balance of free speech and whistle-blower protection should not attach. The court pointed out that here the attorney-client relationship was not only neglected, but wholly abandoned.

The court pointed out that plaintiff's actions, taking the matter out of the hands of the OSBC, embarrassed Dunnick; how, after that, could the attorney-client or boss-employee relationship continue? Moreover, no exigency required plaintiff to avoid the procedures set forth in MRPC 1.13(b) (1994 Kan. Ct. R. Annot. 328) to counsel her clients. The court pointed out that plaintiff's actions were not the reasonable acts of an attorney toward her clients. Plaintiff's actions were those of an attorney representing herself rather than her clients.

The trial court did acknowledge that plaintiff's violations of the Model Rules of Professional Conduct did not present an absolute

bar to her claims. However, where plaintiff's claims are based on public policy and the right to speak on matters of public concern, those rights must be balanced with responsibility. Because of plaintiff's noncompliance with the ethical rules of her profession, her claims were found to be significantly diminished. Citing various authority, the court found that where the asserted rights did not interfere with the employment position, termination was not permitted, but where the right asserted impaired or impeached the working relationship, termination was permitted. The court, in essence, found that the plaintiff's exercise of her rights substantially interfered with her working relationship with her clients.

The court concluded:

> "The balancing of Ms. Crandon's interests under the First Amendment when weighed with her non-compliance with the tenets of her profession and the interest of the State of Kansas in properly assuring the fulfillment of the proper duties of the general counsel for the agency as well as the duties of the state bank commissioner to administer his office in the first instance, require Ms. Crandon's claims to be dismissed under the principles of law announced in *Connick v. Myers*, [461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983)], and *Pickering v. Board of Education*, [391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)].
>
> "Mr. Dunnick was well within his discretion to end a public and professional relationship Ms. Crandon had completely and inappropriately destroyed without fear of legal recourse by Ms. Crandon."

Addressing plaintiff's claim under K.S.A. 1994 Supp. 75-2973, the court found that plaintiff disclosed information which was confidential pursuant to MRPC 1.6(a) (1994 Kan. Ct. R. Annot. 310) and MRPC 1.13(b) and until she satisfied those rules, plaintiff had no duty or privilege to disclose the information. Some of the information (that obtained from the bank examination documents) was also confidential under K.S.A. 9-1712 without the

Commissioner's approval. Moreover, the court found that no reasonable attorney would have perceived the conduct of the defendants as the basis for an out-of-agency report at the time it was made. The court specifically found that information which is confidential under the Model Rules of Professional Conduct is confidential "under any other provision of law" as that phrase is used in K.S.A. 1994 Supp. 75-2973(c)(4)(C), which permits discipline of an employee who releases confidential information. Additionally, the court found that plaintiff's knowledge that Stork had overdraft loans was confidential information.

Plaintiff appeals the trial court's ruling. This court permitted the ACLU and the Kansas Disciplinary Administrator to file briefs as *amici curiae*.

I. SUMMARY JUDGMENT

The plaintiff contends that the trial court erred in making certain findings of fact. She points out, correctly, that the trial court and this court must resolve all facts and inferences which may be drawn from the evidence in her favor as the party opposing summary judgment. See *Kerns v. G.A.C., Inc.*, 255 Kan. 264, 268, 875 P.2d 949 (1994).

First, the plaintiff argues that the trial court erred in concluding that she had reported on the OSBC and Dunnick. She claims that she reported only on the actions of Stork in her individual capacity. However, nowhere does the trial court find that plaintiff reported on the OSBC and Dunnick. Plaintiff is correct in suggesting that she reported on the actions of Stork. It does not appear that the trial court found otherwise.

Second, plaintiff argues that the trial court erred by resolving state of mind and motivation against her. She contends the trial court wrongfully accuses her of "assumption of agency power and authority to herself" and "her rush to judgment on supposition and surmise." Plaintiff cites *Hein v. Lacy*, 228 Kan. 249, 616 P.2d 277

(1980). In *Hein*, this court cautioned against granting summary judgment when resolution of the dispositive issue necessitates a determination of the state of mind of one or both of the parties. 228 Kan. at 256. The plaintiff is correct that there is no evidence she had a corrupt motive or was being vindictive. However, the quotes she points to from the trial court's journal entry concerning her actions do not show that the trial court determined her state of mind and motivation.

Third, the plaintiff argues that the trial court erred in concluding that she reported confidential information to the FDIC. Plaintiff suggests that the information concerning Stork's mortgages, car loans, and her diversion for theft of services were matters of public record. She also suggests that the trial court erred in relying on K.S.A. 9-1712, which provides that "[a]ll information the state bank commissioner generates in making an investigation or examination of a state bank or trust company shall be confidential information," because that statute must be strictly construed to mean documents generated only by the Commissioner. Plaintiff's construction, though not clearly argued, seems to be that documents prepared by other sources, including OSBC employees other than the Commissioner, are not covered by that statute. That construction is incorrect because the term "generates" encompasses documents prepared at the Commissioner's direction, including documents prepared during the course of an OSBC investigation or examination of a bank or trust company. Plaintiff also argues that K.S.A. 9-1712(b) provides that confidential information may be disclosed upon written approval of the Commissioner. She reasons that the OSBC office policy of communicating information to the FDIC on a regular basis satisfies the approval necessary under subsection (b). It does appear that the OSBC had a policy of communicating information generated during bank examinations to the FDIC. However, the real issue concerning confidentiality relates to the fact she was attorney for OSBC. Simply stated, attorneys have a different relationship than other employees, and their conduct is measured by a different standard.

Finally, plaintiff argues that the trial court erred in determining that she did not make an adequate investigation of the facts. She suggests that this issue was not raised by the defendants

and that the trial court should not have resolved it without giving the parties the opportunity to supplement the record. Nothing in the record, however, shows that the plaintiff attempted to supplement the record concerning this issue after the trial court's entry of judgment. Without our determining whether the plaintiff's investigation was "adequate," the record reflects the trial court found that plaintiff did "confirm by inspection at the Record of Deeds' office that the ownership of the property and the mortgage on it to the State Bank of Baileyville was in both Mr. and Mrs. Stork's name and... confirm title to the motor vehicle subject of the loan and lien of Southwest Bank and Trust was likewise in their names." The plaintiff also tells this court she reviewed federal and state statutes, case law, regulations, and internal ethics memoranda. The trial court did not ignore other aspects of investigation plaintiff claims to have done. The court merely found that plaintiff should have investigated whether Stork had actually examined or participated in examining the Southwest Bank and Trust and the State Bank of Baileyville. The plaintiff does not suggest she engaged in such investigation.

II. MODEL RULES OF PROFESSIONAL CONDUCT

The court held that plaintiff's actions were contrary to the Model Rules of Professional Conduct, citing MRPC 1.2 Scope of Representation (1994 Kan. Ct. R. Annot. 295), 1.4 Communication (1994 Kan. Ct. R. Annot. 302), 1.6 confidentiality of Information (1994 Kan. Ct. R. Annot. 310), 1.13 Organization as a Client (1994 Kan. Ct. R. Annot. 328), and 1.16 Declining or Terminating Representation (1994 Kan. Ct. R. Annot. 338).

The plaintiff argues that her conduct did not violate the Model Rules. She focuses on MRPC 1.6 and MRPC 1.13 and argues that she did not violate the rule of confidentiality. She points out that she had no attorney-client relationship with Stork or her husband, the persons she reported on. Stork was merely a constituent of her organization client, the OSBC. See MRPC 1.13. Moreover, the plaintiff argues, Stork never asked for plaintiff's legal advice. The plaintiff also reiterates that the facts she conveyed were in the public

domain, and she did not convey the information to entities other than the FDIC, such as the press. The plaintiff insists that she did not breach the attorney-client relationship she had with the OSBC. She maintains that the information was conveyed in a manner consistent with the established policy of the OSBC to convey information to the FDIC; she contends this policy permitted her to convey information to the OSBC without obtaining prior approval from Commissioner Dunnick. Finally, the plaintiff contends that K.S.A. 1994 Supp. 75-2973(b)(2) exempts her from obtaining prior approval.

The defendant's response is that confidences arise even when the person involved does not approach the attorney. The defendants suggest that plaintiff had a duty to keep Dunnick reasonably informed on all matters related to the representation. Because, according to defendants, violations of state and federal banking laws were within the scope of plaintiff's representation, strict confidentiality attached regardless of the source of the information, and plaintiff had a duty to explain the matters to the client. Moreover, defendants argue, trust and confidentiality are at the core of an attorney-client relationship. The attorney's duty is to advise and counsel, not prosecute her client. The defendants also point out that the drafters of the MRPC rejected a rule which would have permitted an organizational attorney to reveal information otherwise protected if the attorney deemed it necessary in the best interest of the organization. The defendants conclude that plaintiff was Commissioner Dunnick's attorney and that she had a duty to advise him on legal matters in the operation and function of the OSBC. They point out that she obtained information during the course of her representation that Deputy Commissioner Stork may have violated state or federal banking laws, but the only comment Dunnick had heard plaintiff make was her argument during the Emery civil service hearing that Stork had not violated any laws. This followed plaintiff's presentation of evidence (largely by leading questions) from Stork that her conduct did not violate any laws, rules, regulations, or guidelines. Therefore, the defendants reason, the plaintiff had a duty to counsel Dunnick as to her belief that Stork may have in fact violated laws. Because plaintiff went to the FDIC

rather than to Dunnick, the essence of confidentiality was breached. Finally, the defendants reason that it is irrelevant that Stork did not seek plaintiff's advice because organizational attorneys have a duty to advise constituents of potential conflicts and because that did not excuse plaintiff's duty to inform the Commissioner about any actions he needed to take.

We believe the parties have become overly technical and argumentative about the trial court's language. The trial court in general held that an organization's general counsel has obligations different than those of other employees. In using the balancing test discussed below, an attorney's obligation (as general counsel) is first and foremost to the organization. The balancing test as applied here includes the factors that general counsel reported a suspected violation or violations to an outside agency without first consulting with the head of the organization and that had she done so she would have learned that no violations had occurred. Whether plaintiff violated the Model Rules of Professional Conduct is not the determinative factor, and in fact a finding of no violation can be of no comfort to her.

The balancing test is set forth in *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), and *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), and weighs an employee's First Amendment rights against the interests of the State as an employer in promoting the efficiency of the public services it performs through its employees.

In *Connick*, an assistant district attorney was involved and the United States Supreme Court said: "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." 461 U.S. at 151-52. The Supreme Court held the discharge of the assistant district attorney did not offend the First Amendment.

The *Connick* Court also held that whether an employee's right to speak on a matter of public concern outweighs the government employer's interest in effectively providing services is a

question of law and is subject to de novo review. See 461 U.S. at 150 n.10.

In *Goffer v. Marbury*, 956 F.2d 1045 (11th Cir. 1992), an attorney claimed wrongful discharge for exercising First Amendment rights. The court used language we deem applicable to our case:

> "The existence or not of attorney-client relations also bears on whether there was present the "close working relationshi[p]' referred to in *Connick* that gives rise to a 'wide degree of deference' to the employer's judgment. *Connick*, 461 U.S. at 151-52, 103 S. Ct. at 1692. Moreover, definition of Goffer's role with relation to defendants is prerequisite to addressing whether her speech so destroyed her effectiveness in that role that the government interest must prevail over her speech interest." 956 F.2d at 1051.

The Alabama Rules of Professional Conduct at issue in *Goffer*, as do the Kansas Model Rules of Professional Conduct, describe the role of an organization's attorney in the attorney's responsibilities owed to the organization and to the officers and employees of the organization.

As we view the matter, plaintiff was discharged because she was general counsel for the OSBC. The head of the OSBC had been advised of Stork's possible violations, at least as to the bank audit, and had determined there was no violation. He then attended a civil service hearing in which plaintiff put Stork on the witness stand to establish that she had not violated any federal or state laws and that no rules, regulations, or internal policies had been violated. Plaintiff argued to the hearing panel that Stork's testimony was that no violation had occurred.

The OSBC head then attended a meeting with FDIC officials involving other matters and he learned for the first time that plaintiff had twice reported possible violations (once prior to the civil service hearing and a second time either immediately preceding or

immediately after the panel hearing, based on largely different facts) to the FDIC without checking facts that were available to her which would have changed a reasonable attorney's mind. Whether the second reporting by plaintiff to the FDIC occurred before or after the panel hearing is not clear. The panel hearing was held on July 6 and the second telephone call reporting the alleged violations occurred (according to plaintiff's testimony) the first week in July.

Plaintiff's position as chief counsel for the organization required a close working relationship with Dunnick. Dunnick relied on plaintiff for legal advice for his guidance and for the guidance of the organization and its employees. The organization's attorney has a responsibility to give advice when necessary to prevent or rectify unlawful or improper acts of the organization and its employees. This advice must be given by presenting the attorney's opinion to the proper person or persons in the organization who have the authority to correct the problems. A close relationship and need for trust are essential in an attorney's relationship with the organization. Thus, a wide degree of deference to Dunnick's decision to terminate plaintiff is appropriate when something occurs to disrupt that relationship and trust.

We conclude that, although plaintiff may have acted in the utmost good faith, she used poor judgment and did not take steps available to her that a reasonably prudent attorney would have taken prior to reporting what she suspected to be violations to the FDIC, thus destroying her effectiveness as counsel for the OSBC and its employees and especially with the organization's head, Frankie Dunnick. Her acts destroyed any effectiveness she could have with the organization in the future. The governmental interest here must prevail over any First Amendment rights that might be involved. Thus, the trial court did not err in granting summary judgment to the defendants on plaintiff's First Amendment claim.

III. K.S.A. 1994 SUPP. 75-2973

K.S.A. 1994 Supp. 75-2973 provides in pertinent part as follows:

> "(b) No supervisor or appointing authority of any state agency shall:
>
> (1) Prohibit any employee of the agency from reporting any violation of state or federal law or rules and regulations to any person, agency or organization; or
>
> (2) require any such employee to give notice to the supervisor or appointing authority prior to making any such report.
>
> "(c) This section shall not be construed as:
>
> ....
>
> (4) prohibiting disciplinary action of an employee who discloses information which: (A) The employee knows to be false or which the employee discloses with reckless disregard for its truth or falsity, (B) the employee knows to be exempt from required disclosure under the open records act or (C) is confidential under any other provision of law."

The trial court found that no reasonable attorney in plaintiff's shoes could perceive the conduct of the defendants as the basis for an out-of-agency report at the time it was made. The court found that plaintiff's report was made with reckless disregard for its truth or falsity and that she released information which was confidential under the Model Rules of Professional Conduct.

The trial court pointed out that plaintiff had only a second-hand knowledge of facts and did not conduct her own independent investigation of the facts and consideration of the law. For example, plaintiff never knew whether Stork had personally participated in the ongoing examination of the State Bank of Baileyville and did not know whether Stork had compromised that examination. She also did not know that Stork had closed her checking account with the State

Bank of Baileyville. Moreover, the court stated, even by a cursory review of 18 U.S.C. § 213, the principle statute thought to be violated, there was no violation under *U.S. v. Napier*, 861 F.2d 547 (9th Cir. 1988), nor was the state statute, K.S.A. 9-1701(a), violated because Stork was not personally involved in examining a bank in which she had a financial interest. The trial court stated:

> "Accordingly, as a matter of law, unless Mrs. Stork had in fact proximately examined any bank at which she or her husband had loans, or subsequently and proximately obtained loans, or had interfered in, or aided and abetted in such interference, or passed upon a matter in the examination of such a bank on a material matter as Deputy Commissioner, Mrs. Stork's position as Deputy Commissioner would not place her in violation of, or within the sanction of, any criminal or ethics statute cited by Ms. Crandon as a basis for her 'report'."

The trial court correctly determined that unless Stork had personally examined or been involved in any way in an examination of the two banks, Stork would not have violated the law. See *Napier*, 861 F.2d at 548. Stork's financial interest in the State Bank of Baileyville following her pretrial diversion would likewise not be in violation of law if she received prior approval. Plaintiff could have conducted a further investigation before making her report to the FDIC to determine whether Stork had in fact been involved in the examinations of the State Bank of Baileyville and the Southwest Bank and Trust, and she could have obtained information whether Stork had obtained approval for her financial interest in the State Bank of Baileyville despite her pretrial diversion.

K.S.A. 1994 Supp. 75-2973(c)(4)(A) does not require a person to make sure the conclusions to be drawn from information are true before making a disclosure. However, a person receives no statutory protection when he or she makes a disclosure with a reckless disregard for the truth of falsity of the disclosure made. An attorney, and especially the chief counsel, is held to a higher standard

for the reasons set forth in section II. We affirm the trial court on this issue.

IV. OTHER ISSUES

For the reasons stated in sections II and III, plaintiff's common-law claims cannot be sustained.

Other issues raised by the parties need not be addressed.

Affirmed.

Supreme Court, U.S.
FILED
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No. 95-849

In The

Supreme Court of the United States
October Term, 1995

JOYCE H. CRANDON,

Petitioner,

vs.

FRANKIE D. DUNNICK,
Commissioner of the Kansas Banking Commission,
Individually,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED

The first two questions presented by Petitioner's brief are more accurately stated as: Did the Kansas Supreme Court follow United States Supreme Court precedent when it upheld the termination of the State Bank Commissioner's general counsel?

The third question presented requires construction of state law (K.S.A. 60-256) and is not properly a matter for certiorari to this Court under jurisdictional rules. S. Ct. R. 10.

LIST OF ALL PARTIES

JOYCE H. CRANDON, Appellant

THE STATE OF KANSAS for and on behalf of the KANSAS BANKING COMMISSION, and FRANKIE D. DUNNICK, as Commissioner of the Kansas Banking Commission, and individually, Appellees.

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CITATION OF OPINION BELOW

The Memorandum Opinion and Entry of Judgment, signed by the Hon. Franklin R. Theis on December 27, 1993 in Case No. 92-CV-1273, in the District Court of Shawnee County, Kansas, is attached as an Appendix to Respondent's Brief.

JURISDICTIONAL STATEMENT

The statutory authority Petitioner cites for her jurisdictional basis, 28 U.S.C. § 1257(3), was repealed in 1988. Even under the existing § 1257, Petitioner cannot claim a jurisdictional basis; no federal statute is called into question in the case on which Writ of Certiorari is sought, nor is any state statute questioned as being contrary to federal laws or the Constitution.

No. 95-849

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JOYCE H. CRANDON,

Petitioner,

vs.

FRANKIE D. DUNNICK,
Commissioner of the Kansas Banking Commission,
Individually,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. ADDITIONAL MATERIAL FACTS

Petitioner was employed as General Counsel to Commissioner Frankie D. Dunnick, the State Banking Commissioner. As general counsel, Petitioner gave legal advice to Commissioner Dunnick, whose job it was to execute banking laws in Kansas and examine and regulate state banks (Appendix, pp. A-7, A-8; Petitioner's Appendix, p. 3). Before she would testify at her deposition, Petitioner required the Bank Commissioner to waive the attorney-client privilege.

When Petitioner contacted the FDIC about a Deputy Bank Commissioner's alleged violations of law, the FDIC attorney stated he would turn the matter over to the Department of Justice and the Office of the Comptroller for investigation (Appellant's brief, p. 8).

Petitioner described her communication with the FDIC as "reporting" that the Deputy Commissioner had two loans at state

chartered banks (Appendix, p. A-4; Petitioner's Appendix, p. 11). Petitioner's petition and deposition testimony describe her phone calls to the FDIC and advice to a state bank examiner as "reporting." (Appendix, p. A-4; Petitioner's Appendix, p. 14).

No evidence exists that the Deputy Commissioner examined or interfered with the examinations of the two banks which held her loans, i.e. The Baileyville State Bank and Southwest Bank & Trust (Petitioner's Appendix, p. 10).

The Deputy Commissioner did not violate any federal or state banking laws (Petitioner's Appendix, p. 22), and Petitioner took no steps to investigate the facts which would have shown a reasonable attorney that the Deputy Commissioner could not have violated banking laws, including 18 U.S.C. § 213 (Petitioner's Appendix, pp. 20, 22).

Petitioner never discussed her belief that the Deputy Commissioner had violated banking laws with either Commissioner Dunnick, who had the authority to act on any violations, or with Deputy Commissioner Stork (Petitioner's Appendix, p. 17).

The only comment Commissioner Dunnick or the Deputy Commissioner heard Petitioner make about the "reported" violations was during cross-examination at an administrative hearing, when Petitioner elicited testimony, then argued, that the Deputy Commissioner had violated no banking laws (Petitioner's Appendix pp. 7, 9 and 19).

Petitioner embarrassed Commissioner Dunnick by taking her legal opinions to outside federal agencies, rather than to him (Petitioner's Appendix, p. 12); no exigency existed which required Petitioner to avoid giving advice to her clients before reporting to outside officials (Petitioner's Appendix, p. 12).

Commissioner Dunnick and his staff stated that they had lost confidence in Petitioner at the time of her termination (Appellee's Brief, p. 5).

II. MISSTATEMENTS OF FACT

Petitioner refers to her communications with the FDIC as "inquiries." Although the legal effect is the same, see below, Pe-

titioner's testimony, the petition and lower court holdings classified the communications as "reporting" (Petitioner's Appendix, p. 11, 14; Appendix, p. A-4).

Contrary to Petitioner's statement on page 13, pertinent portions of the Emery transcript were part of the record on appeal. (Appendix, p. A-14; Petitioner's Appendix, p. 7, 9).

Contrary to Petitioner's statement on pages 15 and 16, there is no evidence that Commissioner Dunnick "lied" about any matters at the Emery hearing; no such allegation was ever made prior to the petition for certiorari.

Contrary to Petitioner's statement on page 19, her job was not to give advice to examiners concerning matters dealing with the administration and violation of banking laws, Petitioner's job was to give advice to Commissioner Dunnick, the only official with authority to act (Petitioner's Appendix, pp. 9, 11).

Contrary to Petitioner's statement on page 20, Petitioner has no information or evidence that the Deputy Commissioner examined Southwest Bank & Trust (Petitioner's Appendix, pp. 16, 21-22).

ARGUMENT

I. SUMMARY OF THE ARGUMENT

The Kansas Supreme Court used the factors set out by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968), and *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983), to determine that Petitioner's first amendment right to public comment was outweighed by Commissioner Dunnick's interest in the effective operation of his agency. The Court found that Petitioner's actions in speaking to an outside federal agency about the Deputy Commissioner's alleged criminal violations, without properly investigating the facts or following the law, and without discussing the matter with Commissioner Dunnick, who had the authority to act on any such violations, destroyed her effectiveness as his counsel. Petitioner's repeated breach of her duties as the agency attorney signif-

icantly disrupted the future relationship and trust between her, as general counsel, and Commissioner Dunnick, as agency head. Because a close working relationship and trust are vital to the relationship between counsel and Commissioner, the destruction of this relationship tipped the *Pickering* balance in the government's favor.

II. ARGUMENT AND AUTHORITIES

Commissioner Frank Dunnick hired Petitioner in late 1991 to act as general counsel for the State Bank Commissioner. Petitioner provided legal advice to the Commissioner in his administration of state banking laws and regulation of state banks. The Commissioner's second-in-command was Judi Stork, his Deputy Commissioner. In mid-1992, a review examiner brought to Petitioner's attention the fact that Stork or her husband had loans at two state banks. Petitioner performed a cursory review of the facts underlying the loans. Petitioner believed 18 U.S.C. § 213 was violated, a federal criminal statute which stated, and was construed to require, an "examiner" who "examines" a bank at which she has a loan. Without these two elements, no violation exists. *U.S. v. Napier*, 861 F.2d 547 (9th Cir. 1988). State banking laws also required banks to be examined by individuals with loans before a violation was found. The Deputy Commissioner had not examined either bank brought to Petitioner's attention.

Over the course of the summer of 1992, Petitioner made two phone calls to Gerald Lamberti, attorney for the FDIC. Petitioner relayed to him that a Deputy Commissioner of her agency illegally had loans at two state banks. Lamberti stated he would pass the information along to the Department of Justice and Office of the Comptroller. At no time did Petitioner talk to the Deputy Commissioner to verify her second-hand facts and assumptions; Petitioner never talked to Commissioner Dunnick to advise him she believed state and federal banking laws were being violated by his Deputy. In fact, at a civil service hearing shortly before her termination, Petitioner elicited Stork's testimony and made vigorous arguments to the administrative panel that Stork's state loans did

not violate any laws. Also shortly before her termination, Petitioner advised the review examiner to report the matter of Stork's loans to the FDIC for action.

Through an official for the FDIC, Commissioner Dunnick learned that Petitioner and the review examiner she advised had reported the Deputy Commissioner to the FDIC. Commissioner Dunnick was furious with Petitioner for taking her legal opinions outside his agency without his knowledge; he was also embarrassed that outside agencies had information, through his agency attorney, that he did not have. The Court found there would be a detrimental impact on all future Commissioner-counsel relations. Commissioner Dunnick terminated Petitioner's employment as his general counsel.

Both the state district court and the Kansas Supreme Court found that Commissioner Dunnick was justified in losing his trust and confidence in his general counsel. The Model Rules of Professional Conduct, which Kansas has adopted, prescribe the steps Petitioner should have taken when the review examiner discussed the Stork loans with her. Petitioner should have performed an independent investigation of the facts to determine whether Stork had examined either of the banks holding her loans. Petitioner should have researched the annotations to state and federal banking laws and determined if the facts supported a violation of the laws. If Petitioner then concluded a violation had been committed, the lower courts held, she should have informed Commissioner Dunnick about the matter and advised him how to proceed in enforcing the banking laws. None of the foregoing actions was taken, held the lower courts, in derogation to Petitioner's duty as an attorney and as agency general counsel. Moreover, Petitioner should never have represented to an administrative tribunal that Stork violated no laws when Petitioner was apparently convinced of Stork's violations. The Kansas Supreme Court held Petitioner's failure to take appropriate steps for the protection and guidance of her agency and client caused Commissioner Dunnick to lose confidence in her abilities and trust in her judgment.

The appropriate starting point to determine whether an employee's first amendment rights have been wrongfully denied is the *Pickering* case; accordingly, the Kansas Supreme Court began with *Pickering* factors to gauge the parties' competing interests. The *Pickering* holding is specifically directed toward employees who have interests similar to any "citizen's" (391 U.S. at 568, 20 L.Ed.2d at 817), whose statements are not directed toward anyone with whom he would be in daily contact (391 U.S. at 569-570, 20 L.Ed.2d at 818), and whose relationship with his superiors is in no way confidential or of such a personal and intimate nature that the employee's public criticism would undermine the effectiveness of the working relationship (Id., fn. 3). *Pickering* is also distinguished from the situation in which the employee ". . . carelessly made false statements about matters so closely related to day-to-day operations . . . that any harmful impact on the public would be difficult to counter because of the [employee's] presumed greater access to the real facts." 391 U.S. at 572, 20 L.Ed 2d at 819. This Court's conclusion in *Pickering* was that the government's interest in effective and efficient fulfillment of its responsibilities to the public was subordinate to the employee's interest in voicing his opinion. Every element of Petitioner's scenario is distinguishable from Marvin Pickering's.

Petitioner did not have simply a "citizen's" interest in speaking out; as general counsel she had access to highly confidential, unformed opinions and material. Her apparent access to such materials gave her comments greater weight and validity. Petitioner's breach of the Commissioner's trust and confidence, based on the nature of her position, had much more serious effects on the agency, as the lower courts found; for instance, the Commissioner's future reluctance to seek advice from counsel he does not trust leaves the agency to operate in a legal void. Petitioner was the "personal and intimate" employee which *Pickering* footnote number three describes, and which the Kansas Supreme Court recognized as having the ability to undermine any effective relationship with the Bank Commissioner.

Petitioner argues that she was merely making "inquiries" to the FDIC (despite her own testimony and the FDIC attorney's statement to her that the matter would be passed onto a prosecutorial body). Terming communications inquiries, rather than reports, does not relieve Petitioner of the responsibility for destroying her relationship with Commissioner Dunnick. Connick, too, was merely making inquiries through her in-house questionnaire. The Court found that these "questions, no less than forcefully stated opinions, carry messages" and the messages carry "the clear potential for undermining office relations." (461 U.S. at 152, 75 L.Ed 2d at 723). Additionally,this Court recognized in *Connick* that close working relationships between attorneys and their superiors are necessary for the "efficient and successful" operation of the office (461 U.S. at 151, 75 L. Ed. 2d at 723); thus, the employer in *Connick* was accorded a wide degree of deference in his employment decisions. *Id.* Contrary to Petitioner's position, this Court rejected a showing of "actual disruption" in favor of the employer's reasonable belief that potential disruption and destruction of office relationships would result from the employee's question. 461 U.S. at 152, 75 L.Ed 2d at 723.

The Kansas Supreme Court followed *Connick* and found the requisite close working relationship between Commissioner Dunnick and his counsel. The Court found clear potential for disruption where the Commissioner relied on Petitioner for his legal advice and guidance, and Petitioner breached her responsibility to "give advice when necessary to rectify or prevent unlawful or improper acts of the organization and its employees." Petitioner's Appendix, p. 20. The Court afforded the Commissioner deference in his decision to act where the close working relationship and need for trust in his counsel would be disrupted. In fact, evidence of *actual* disruption and lack of trust were present in the Commissioner's statements that he had lost confidence in his counsel and in his anger at her betrayal of her duties to the agency. *Connick* requires no further proof to tip the balance toward the government.

Rankin v. McPherson, 483 U.S. 378, 388, 97 L.Ed. 2d 315, 327, 107 S.Ct. 2891 (1987), restates the government's interest that

statements not impair discipline by superiors, that statements not have a detrimental impact on close working relationships when personal loyalty and confidence are necessary, that statements not impede the employee's performance of her duties and that statements not interfere with the regular operation of the agency. Under these criteria as well, Petitioner's careless disclosures to an outside agency, without her client's knowledge, undermined the agency's ability to fulfill its functions in all future matters needing legal advice. The Kansas Supreme Court so recognized.

Petitioner cannot find solace in *Waters v. Churchill*, 511 U.S. ___, 128 L.Ed. 2d 686, 114 S.Ct. ___ (1994). The opinion is a plurality and, therefore, has no precedential value. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L. Ed 2d 250 (1977), citing, *Gregg v. Georgia*, 428 U.S. 153, 169, n. 15, 49 L.Ed 2d 859, 96 S.Ct. 2909 (1976). Moreover, *Waters'* only variation from *Pickering* and *Connick* does not apply to Crandon; that is, if there is a dispute between the employer and the employee as to the content of the speech the employer must take certain steps. For purposes of summary judgment and appeal, Commissioner Dunnick conceded to Petitioner's version of her speech throughout the lower court proceedings. Again, the Kansas Supreme Court followed applicable precedent; it recognized the protected nature of Crandon's speech, but, when balanced against the potential and reality of harm to the agency caused by her speech, her first amendment protection was found to be subordinate to the agency's interest in performing its public duties.

Petitioner's last question asks this Court to reconsider the Kansas Courts' application of the state standard for summary judgment, K.S.A. 60-256. This Court has no jurisdiction over such matters of state procedural law.

CONCLUSION

The lower courts in this case carefully followed the guidelines of *Pickering* and *Connick* in weighing the government's interest against Petitioner's. There is no statute or federal law at issue in this case; there is no finding or holding contrary to Supreme Court

precedent. This Court has no jurisdictional basis for granting petitioner's writ of certiorari. Respondents urge the petition be denied.

Respectfully submitted,

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APPENDIX

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

DIVISION SEVEN

JOYCE H. CRANDON, Plaintiff,	)	
vs.	)	
	)	Case No. 92 CV 1273
THE STATE OF KANSAS, for and on behalf of the KANSAS BANKING COMMISSION, and FRANKIE D. DUNNICK, as Commissioner, and individually, Defendants.	)	

MEMORANDUM OPINION AND ENTRY OF JUDGMENT ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Nature of the Case/Findings of Fact:

This is an action brought by the plaintiff, Joyce H. Crandon, claimed arising as a result of her termination as general counsel for the Office of the State Bank Commissioner, a state agency consisting of the State Banking Board and the State Bank Commissioner, by the action of Frankie D. Dunnick, the State Bank Commissioner.

Plaintiff asserts in her petition, including her proposed amended petition, four separate causes of action upon which she claims a basis for recovery against the above captioned defendants. These causes of action include a claim against the defendants for violation of 42 U.S.C. 1983 claiming her termination was a result of her exercise of "speech" protected under the First Amendment to the United States Constitution. The other three causes of action alleged claim she was terminated in retaliation for her "whistle-

blowing" against the agency or its personnel either under the common law cause of action recognized by the Kansas Supreme Court in *Palmer v. Brown*, 242 Kan. 893 (1988) or in *Larson v. Ruskowitz*, 252 Kan. 93 (1993) or the statutory cause of action established in favor of state unclassified employee "whistleblowers" by K.S.A. 75-2973(g).

There is a dispute of fact between the parties and the dispute of fact could be, subject to predicate facts, one central to plaintiff's recovery under any cause of action pled, that is, "but for" plaintiff's alleged act(s) of communication(s) would she have been terminated by her employer. Central to this issue would be the credibility of the evidence as to what was said to her, and meant, by Commissioner Frankie D. Dunnick at a meeting shortly precedent to her termination. Accordingly, for the purpose of the pendant motion, the court must assume the plaintiff's recitation of, and the meaning ascribed to, the pretermination event is correct.

A second central point of fact subject of dispute, but closely interwined with the aforementioned factual dispute, is whether, in fact, Commissioner Dunnick was aware of the communication Ms. Crandon alleges as the basis for her termination. Nevertheless, for the purpose of the present motion it is assumed Mr. Dunnick knew of the communications.

The record reveals the following facts claimed by plaintiff to define her claim:

"Q. What was the matter of public concern that you either talked to Eric about or talked to Gerry Lamberti about?

A. The Stork loans.

Q. The car loan and the home loan?

A. Yes, examiner loans.

Q. And why did you feel those were a matter of public concern?

A. All you have to do is read in the newspaper every single day and you can see about the RTC, about the failed saving and loans, about the failed banks. There was an article in the newspaper that said 25 percent of the loans were insider type loans that were

problems with all these failed S&L's. You just have to pick up the newspaper. You don't have to be a rocket scientist to find that out.

Q. Did you have any information that these loans were problem loans?

A. No, I do not.

Q. Did you think they were not supported by adequate financial statement?

A. I didn't make an opinion of that. I thought they were in in violation of the law. I mean that isn't what the laws says. The law says that examiners shouldn't belong to state—have loans to state chartered banks.

Q. And the examiner that you're talking about is Judi Stork?

A. That's right.

Q. Let me ask you one more time because I am still a little confused. The matter, the matter of public concern was the loans because there are troubles with insider loans or because—

A. Because they're a violation of the law.

Q. Okay.

A. The law says examiners are not to have loans at banks.

Q. 18 U.S.C. 213?

A. That's correct.

Q. An in —

A. As far as that's concerned, I think it's a public concern for the state, state laws and the state ethics policy. If we have a state ethics policy, and there is no, you know, there is no one to enforce it and it's not enforced within the department, I think it should be reported to somebody who has some authority to do something about it, and the FDIC is a co-regulator and does joint exams or alternate exams.

Q. On Paragraph 35, the petition says plaintiff reported a matter involving public concern, and again, the matter that you're reporting is the two—the car loan and the home loan that Rob Stork took out?

A. Yes, the Stork loans, and I think at some time there was questions. There was inquiries about overdrafts and if overdrafts

were in fact loans, regulations on that overdraft side of loans, what definition of an extension of credit is.

Q. Are you saying now that your termination was caused by reporting overdrafts as well as loans?

A. Inquiries, I had inquiries because that's where I got that—Lamberti gave me the cite on the regulation and it was just strictly what the definition of an extension of credit was and that's in my memorandum.

Q. Is that what you call reporting is you ask Lamberti about a law and he gives you a citation or a law, that's reporting facts?

A. I made inquiries about—inquiries.

Q. Inquiries?

A. That's what he called them were inquiries.

Q. And you agree with that?

A. I— reporting and inquiries, yeah.

Q. What was the difference, what was the reporting?

A. Oh, the whole conservation. I can't dissect it because I don't have a transcript of the conversation. I don't have a tape recording of the conversation.

Q. What portions of the conversation by you constituted reporting?

A. Well, I think when you identify somebody as a Deputy Commissioner who has two different state chartered banks, which, you know, that possibly could be constituted as reporting.

Q. But you said you were just calling up to ask questions about specific facts? You were inquiring as to what the state of the law was?

A. That's correct, but I was also giving information. I was giving facts, a lot of facts.

Q. You were giving Gerry Lamberti information?

A. I was giving him facts.

Q. And that's what you mean by reporting the context of Paragraph 35 and 34?

A. Yes, those two, those two phone conversations with Gerry Lamberti and then my advice to Eric when we found out about

Marilyn's conversation with bank examiner, I, I told Eric to turn it over to the FDIC.

Q. Did you ever tell anyone inside the Bank Commissioner's office that you had advised Eric to turning over to the FDIC?

A. No, I did not.

Q. Did you ever tell anyone outside the Bank Department other than an attorney that you advised Eric to turning over to the FDIC?

A. No, I did not.

Q. I, I said ever. I mean prior to your termination?

A. No, not that I can recall.

Q. Paragraph 36 says the defendants terminated the plaintiff in retaliation for exercising her right of free speech. What facts support that allegation?

A. Just what I've just reported, just what I just told you.

Q. On what facts do you base the statement that your termination was in retaliation?

A. The Commissioner told me so, the Commissioner's own words and the timing.

Q. What words by the Commissioner?

A. The Commissioner said I want you to know that nobody goes over my head to the FDIC. It makes me look like I don't know what's going on. I know you've been talking to Eric and that little boy is going to find out who is in charge around here. I am not through with him. That little boy is going to find out who is in charge around here, and those are— I've already turned those minutes over. I've got verbatim what he said because I made notes of it and you've got records of that.

Q. The commissioner's words and the timing?

A. Mm-hmm.

Q. The timing of what?

A. The timing of my dismissal, I was fired on the 13th. I told Eric to turn this over I think it was on the 7th or the 8th, which was on a Tuesday or a Wednesday before I got fired on Monday. The Commissioner called—I know the Commissioner talked to Pritchett and to Baileyville people on Thursday before I got fired.

It's in the minutes. He admitted that in his interrogatories, and I know that the Commissioner had a conversation with Eric and with, with Eric and with George Myers who was the supervisor of the Topeka crew on Friday before I was dismissed on Monday.

MS. ULRICH: Do we need to stop here for a minute?

(Off the record)

Q. (By Ms. Ulrich) What does the Commissioner's conversation with Ray Pritchett have to do with your termination?

A. Pritchett told—Dunnick told me that Pritchett told him that there was an investigation going on. I've got it more clearly in my notes.

Q. Did your name come up in Pritchett's conversation?

A. Dunnick told me he did—I mean he didn't tell me my name came up, but he said I know you've been talking to Eric. Dunnick told me, he says I know you've been talking to Eric and Pritchett had told him—Dunnick told me that Pritchett told him that there was an investigation going on into the Stork loans.

Q. Did your name come up in the conversation between the two of them?

A. The Commissioner told me that Pritchett had told him that—this is what the Commissioner told me when he fired me.

Q. I just asked you a question as to whether your name came up. Did he say your name came up in the conversation between him and Pritchett?

A. He said I know you've been talking to Eric, and I want you to know nobody goes over my head to the FDIC. Makes me look like —

Q. Your answer is no?

A. My answer is not no. My answer is just what I said.

Q. Your name either did come up or it didn't come up.

A. I don't know. He told me he knew I had been talking to Eric, nobody was going over his head to the FDIC. And I think in my notes there is something to the effect that Eric did not have the authority to go over his head or something like that to the FDIC."

(Plaintiff's Exhibit C, Deposition of Joyce Crandon, at pages 373 beginning at line 2, 374, 375, 376, 378, 379, 380, and 381 ending with line 24.

No other facts *material* to the issues presented by the defendants' motion for summary judgment are in dispute.

Conclusions of Law:

The court is of the view that even assuming the disputed facts in plaintiff's favor, the remaining materially undisputed threshold facts require that summary judgment be entered in favor of the defendants and plaintiff's petition be involuntarily dismissed on all claims as to all defendants.

Central and to the legal heart of each claim of plaintiff is the necessity of resolving one question, that is, whether each alleged communication itself under the circumstances and conditions under which it was made and based on the record as a whole was legally protected such as to insulate plaintiff from termination for the mere act of communication. This, or undisputed facts, is question of law for the court under *any* claimed cause of action.

The further undisputed facts reveal the following.

Ms. Crandon carried the title of general counsel to the office of the state bank commissioner and had the status of an assistant attorney general. She began upon her duties on November 18, 1991. Her position was in the unclassified civil service. See, K.S.A. 75-3135; K.S.A. 75-2935(l)(j) and (m). As such, she had no tenure and was an "at will" employee. Compare, *Riddle v. City of Ottawa*, 12 Kan. App. 2d 714, 716-719 (1988), pet. rev. den., 243 Kan. 780 (1988).

The State Banking Board is a state agency whose function it is to advise on the regulation and examination of state chartered banks by the office of the state bank commissioner. It has other duties separate from the powers of the state bank commissioner. See, K.S.A. 74-3004; K.S.A. 9-1801 et seq. It also acts as an appellate body concerning some decisions made by the state bank commissioner. See, K.S.A. 9-1714, 1716, 1804. The Board also has authority to remove a bank officer or director for violating banking

laws (See, K.S.A. 9-1805). Otherwise, the banking board acts independently in approving certificates of authority to operate banks (K.S.A. 9-1801), controls the change of location of banks (K.S.A. 9-1802), and acts on branch banking applications (See, K.S.A. 9-111b). Otherwise, it is the state bank commissioner who has the principal authority under K.S.A. 9-1701 et seq. to execute the laws and to examine and regulate banks.

The Board itself consists of nine members appointed by the governor and confirmed by the State Senate. See, K.S.A. 74-3004. The state bank commissioner is appointed by the governor and confirmed by the State Senate. It is the bank commissioner's duty to administer the state's banking laws. The state bank commissioner holds office for a term of four years. See, K.S.A. 75-1304. Further authorized is a deputy commissioner appointed by the commissioner. The Deputy Commissioner is in the unclassified civil service and enjoys no tenure, but serves at the pleasure of the state bank commissioner. See, K.S.A. 75-3135.

The remaining staff of the agency, exclusive of clerical personnel, consists of individuals holding office and authority as "examiners" whose duties involve actual performance of, or supervision of, examinations of state chartered banks. All these personnel, as well as clerical staff, hold positions in the state classified civil service system, meaning they are not subject to dismissal without cause. See, K.S.A. 75-3135; 75-2935(2).

It was the duty of Ms. Crandon to act as the legal advisor to, and attorney for, this agency. Beginning approximately April to May 1992, one of the review examiners, Erik Berggren, became aware that the Deputy Commissioner, Judi Stork, who had held appointment in the agency since 1981, first as an examiner and subsequently, at the time in question, in the position of deputy commissioner, could be considered to have existing loans from two state chartered banks, the State Bank of Baileyville, also a bank in which her financial disclosure statement filed pursuant to K.S.A. 46-247 et seq. disclosed she had a "substantial interest", and from the Southwest Bank and Trust in Topeka. (See, Defendants' Exhibit A, Deposition of Erik Berggren, pages 28, 29, 34, 35, 38.)

One loan from the State Bank of Baileyville consisted of a note signed only by her husband, but the resulting mortgage on her home was signed by both she and her husband. Other loans consisted of a series of overdrafts on a personal checking account she held with that bank. Another loan existed at the Southwest Bank and Trust upon which, although Mrs. Stork was not a signatory to the loan documents, the collateral, a car, was titled in the name of she and her husband, he being the sole signator on the loan. For the purposes here it is not necessary for the court to determine whether, in fact, Mrs. Stork was a loan recipient in each circumstance, however, for the purpose of defendants' motion the court shall presume in each instance she was a loan recipient. See, Defendants' Exhibit B, attachments: mortgage, vehicle registration.

In any manner, Mr. Berggren believed that such loans placed Mrs. Stork not only in violation of the agency's own internal written ethics code (See, Defendants' Exhibit B, "Department Policy Memorandum" of June 22, 1989), but also constituted a violation of state and federal banking laws.

In this regard, K.S.A. 9-1701(a) provides:

> *"The commissioner or the commissioner's assistant or examiners shall visit each bank and trust company at least once every 18 months, and may visit any bank or trust company if the commissioner deems it necessary, for the purpose of making a full and careful examination and inquiry into the condition of the affairs of such bank* or trust company. For such purpose the commissioner, the commissioner's assistant and examiners are authorized to administer oaths and to examine under oath the directors, officers, employees and agents of any bank or trust company. Such examination shall be reduced to writing by the person making it and such person's reports shall contain a full, true and careful statement of the condition of such bank or trust company. The commissioner in lieu of making a direct examination and

inquiry may accept the examination and report of an authorized federal agency. The commissioner shall provide to the board of directors of the bank or trust company a copy of the examination report written by the state examiners. *Neither the commissioner, the commissioner's assistant nor any examiner shall examine any bank or trust company in which the person making such examination is a stockholder or is otherwise financially interested or to which bank or trust company or any officer thereof the person making the examination is indebted.*" (Emphasis supplied.)

Also noted is 18 U.S.C. 213 which provides:

"Whoever, being an *examiner or assistant examiner* of member bank of the Federal Reserve System, financial institutions the deposits of which are insured by the Federal Deposit Insurance Corporation, which are branches or agencies of foreign banks (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978 [12 USCS Sec. 3101(1), (3)]), or which are organizations operating under section 25 or section 25(a) of the Federal Reserve Act, or a farm credit examiner or examiner of National Agricultural Credit Corporations, or an examiner of small business investment companies, accepts a loan or gratuity from any bank, branch, agency, corporation, association or organization *examined by him* or from any person connected therewith, shall be fined not more than $5,000 or imprisoned not more than one year, or both; any may be fined a further sum equal to the money so loaned or gratuity given, and shall be disqualified from holding office as such examiner." (Emphasis supplied).

Further, to be noted, as it will be addressed subsequent, is 12 U.S.C. 1289, as amended, as here relevant:

> "(a) Prohibition
>
> (1) In general
>
> Except with the prior written consent of the Corporation—
>
> (A) any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or money laundering or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, may not—
>
> (i) become, or continue as, an institution-affiliated party with respect to any insured depository institution;
>
> (ii) own or control, directly or indirectly, any insured depository institution; or
>
> (iii) otherwise participate, directly or indirectly, in the conduct of the affairs of any insured depository institution;"

Further, in reference to the above statute, the phrase "institution affiliated party" is defined in 12 U.S.C. 1813(u), as here relevant as follows:

> "(1) any director, officer employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution;
>
> . . .
>
> (3) any shareholder (other than a bank holding company), consultant, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution;
>
> . . ."

Subsequent, probably in April to May or June 1992, Mr. Berggren first brought his concerns to Ms. Crandon's attention (See, Defendants' Exhibit A, page 38; plaintiff's affidavit of September 1, 1993). Further, this underlying factual situation concerning Mrs. Stork became a part of a civil service hearing in a termination proceeding initiated by the Commissioner regarding an employee (not related to this case) that had been appealed by the employee examiner to the state civil service board at which Ms. Crandon appeared in defense of the agency action. The employee had been terminated based on her conviction for violating 18 U.S.C. 213. The issue at note arose from an apparent "what's good for the goose is good for the gander" defense claiming that Mrs. Stork had loans with state chartered banks and she was not terminated. The terminated employee was reinstated by the civil service board. This hearing was on July 6, 1992. Ms. Crandon had argued before the Kansas civil service board that Mrs. Stork was not in violation of any such laws and the circumstances were not comparable. The Board's reasoning for its decision to reinstate the employee does not support any finding, conclusion, or reasoning by any reference to Mrs. Stork's circumstance. See, "Defendants' Reply to Plaintiff's Response", Exhibit C.

Mrs. Stork's circumstance was also raised by state bank examiners as a part of the regular examination of the State Bank of Baileyville on going circa this same period. (Defendants' Exhibit A, id.; Plaintiff's 11/8/93 "Supplemental Response", Exhibit "Berggren" notes.) At one point in June 1992, and again the week of July 6, 1992, Ms. Crandon made, on each occasion, a phone inquiry to the Federal Deposit Insurance Corporation regional office in Kansas City, specifically, to Mr. Lamberti, its regional counsel, whether in his view Mrs. Stork's circumstances were in violation of federal law, specifically 18 U.S.C. 213. (See, Plaintiff's Exhibit C, supra, at page 374-376, 378.) Mr. Lamberti subsequently has testified that he did not perceive a violation, but that such an issue was an internal one for the state agency. Admittedly, he said his response was ad hoc and without research. Notwithstanding, in considering defendants' motion the court will consider Mr. Lamberti's re-

sponse as sufficiently ambivalent such that plaintiff might believe his response at least left a question raised as to the violation of federal law. (See, Defendants' Exhibit H and Plaintiff's "Supplemental Response" of 11/8/93; Deposition of G. Lamberti"; Defendants' Exhibit B, deposition of plaintiff, pages 233-234, 240.)

Sometime during the week of July 6, 1992, Ms. Crandon advised Mr. Berggren to turn the matter over to the FDIC, which he did. Mr. Berggren has testified he would have done so in any manner notwithstanding any advice of Ms. Crandon. (See, Defendants' Exhibit A, page 110; Defendants' Exhibit B, page 229).

Subsequently, and for the purpose of the motion and taken as true, Commissioner Dunnick learned at a meeting with the FDIC on July 9, 1992, of Mr. Berggren's reporting to the FDIC, Ms. Crandon's advice to him to do so, and her inquiries to Mr. Lamberti.

At no time prior to her termination, except during questioning at the civil service hearing on July 6, 1992, when Mrs. Stork and Mr. Dunnick were called as witnesses, had Ms. Crandon personally talked with Mr. Dunnick or Mrs. Stork about Mrs. Stork's status vis a vis the identified loans and whether Mrs. Stork's loan circumstances violated federal or state banking laws, state ethics statutes, or internal agency ethics policy (Defendants' Exhibit B, pages 241, 263; Defendants' Statements of Fact 29; Plaintiff's Response Memorandum, Fact 29.)

At no time prior to Ms. Crandon's termination did Ms. Crandon, attempt, in any manner, to persude Mr. Dunnick, as the agency's head, that he should affirmatively act in some fashion under his authority as Commissioner to remedy the situation she believed was presented arising from the fact of Mrs. Stork's loans (id.).

Ms. Crandon asserted through counsel at oral argument in this case that she made one phone call to the attorney general's office and was told they don't give opinions on criminal matters. The person called is not identified.

There is no evidence Ms. Crandon contacted any member of the banking board or the Governor's office before her termination.

For the purpose of the motion, it is assumed Mr. Berggren told Ms. Crandon that he had discussed the loans with Mrs. Stork and that he had brought them to the attention of Commssioner Dunnick who said he would look into it (See, Defendants' Exhibit A, page 97). The conversations between Berggren, Stork, and Dunnick probably occurred prior to May 27, 1992. (See, Defendants' Exhibit D, Document 200337; Defendants' Exhibit A, pages 35, 38.)

Whether Ms. Crandon knew Mrs. Stork had told Mr. Berggren she had never had authority to examine the State Bank of Baileyville since she first came to the agency or that Mrs. Stork had closed her checking account at the State Bank of Baileyville is unclear. (Defendants' Exhibit B, page 229.) However, she did not know that Mrs. Stork had replied to the inquiries by memo to the commissioner. (Defendants' Exhibit B, page 263.) Notwithstanding, these facts could have been confirmed by agency documents or official inquiry to the bank. See, Defendants' Exhibit D, Documents 200337, 200338, 200339, 200340. Ms. Crandon did not see these documents and the response of Mrs. Stork to inquiries posed to her as to her authority to examine the State Bank of Baileyville when she was a witness, under oath, in the Emery civil service hearing were that she had no such authority. (Defendants' Exhibit B, page 263, 305-306.) Ms. Crandon knew from Mr. Berggren that Commissioner Dunnick had reviewed the matter by June 1, 1992, and had concluded Mrs. Stork's situation violated no state policy, but she did not know the basis for his decision except for what she may have learned at the civil service hearing. (See, Defendants' Exhibit A, page 35; Defendants' Exhibit B, pages 229, 263.)

Further, no evidence has been proffered by the plaintiff that she had *any* other source of *factual* information to form any opinion that Mrs. Stork's loans were in violation of any law or policy other than by talking to Mr. Berggren or to Mr. Lamberti, except to confirm by inspection at the Record of Deed's office that the ownership of the property and the mortgage on it to the State Bank of Baileyville was in both Mr. and Mrs. Stork's name and to confirm title to the motor vehicle subject of the loan and lien of Southwest

Bank and Trust was likewise in their names. Plaintiff is unable to say what, if any, case law she reviewed prior to any advice to Mr. Berggren or used in the formulation of any opinion of wrongdoing other than *St. Francis Hospital v. Browles*, 251 Kan. 334 (1992), which explains the doctrine of necessaries vis a vis one's spouse's liability for the debts incurred by the other. The statutes or regulations upon which she stated she relied were K.S.A. 9-1701, 12 U.S.C. 213, 12 U.S.C. 1289, and 12 C.F.R., part 215.

Plaintiff proffers no evidence existing at the time of her report to support her assertion that Mrs. Stork had unlawfully examined the Southwest Bank and Trust (See, Defendants' Exhibit B, page 260) or interfered with the examination of the State Bank of Baileyville. (See, Defendants' Exhibit B, page 225-226; Defendants' Exhibit C, page 323, 325-326.) Ms. Crandon did state she believed Mrs. Stork had authority to examine *any* Kansas Bank. (See, Defendants' Exhibit B, pages 253-255). Ms. Crandon states she investigated whether Mrs. Stork was in violation of 12 U.S.C. 1289 by examining Case 82 CR 234 in the Shawnee County District Court and Mrs. Stork's disclosure of substantial interest statements filed with the Secretary of State, but did not discuss with anyone, but Mr. Berggren, whether Mrs. Stork's prior diversion agreement placed her in violation of federal law because she had an ownership interest in the bank. She undertook no other investigation nor inquiry. (See, 12 U.S.C. 1289; 82 CR 234, District Court of Shawnee County; See, Defendants' Exhibit B, pages 271, 273). There is no evidence the subject matter of her 12 U.S.C. 1289 inquiry was part of any "whistleblowing" claim (See, Defendants' Exhibit B, pages 231, 271) or that Mr. Dunnick knew of it, however, it is accepted by the court as advanced as one motivation by Ms. Crandon for her "reporting" activity and procedure. Of course, factual information arising after her "reporting" would not be a proper standard to test the reasonableness of her belief at the time of reporting.

It seems substantially clear and not reasonably subject to material dispute what Ms. Crandon's "whistleblowing" and/or "free speech/public concern" communication claim is alleged to be. It consists of up to two inquiries to Mr. Lamberti of the FDIC con-

cerning loans made to a spouse of what Ms. Crandon represented was a deputy commissioner or "supervisory examiner" and, for the purpose of this matter, further inquiries and reporting of the circumstances concerning such loans to the FDIC by Erik Berggren which, though encouraged by Ms. Crandon, Mr. Berggren would have proceeded on in such manner in any fashion.

The plaintiff's claim is that she was terminated by her employer, the state bank commissioner, for this collective "reporting" to the FDIC.

Certainly, the violation of state or federal banking or ethics laws is of public concern and, specifically, the violation of federal banking laws is of specific concern to the FDIC, the federal regulatory agency charged with examining and regulating such federally insured banks. However, it is also equally the concern of the state bank commissioner. See, K.S.A. 9-1701 et seq.

The difficulty, and flaw if you will, inuring in Ms. Crandon's claim of protection from termination for such act(s) of communication rests in two undisputed factual considerations.

First, Ms. Crandon was the attorney for the very agency whose employee was "reported" upon. Everything she knew or learned factually concerning the subject matter of such reporting derived from her position as such agency's attorney. Yet, as the organization's attorney she took no steps to present her concerns to the agency head, Commissioner Dunnick, who had authority clearly to act against his appointee and at will employee, Mrs. Stork. Further, other than by pure supposition from what Ms. Crandon may have been told by examiner Erik Berggren or what she may have heard in the July 6, 1992, civil service hearing, she had no reason to believe, in fact, any proffered counsel and advice by her as general counsel for the agency on the issues raised by the circumstances alleged reported upon would have been rebuffed or neglected, or, if previously considered by Mr. Dunnick, would not be reconsidered by him after hearing her legal advice and opinion. After all, the statutory duty to report a violation of the banking act to the county (or district) attorney was on the commissioner. See, K.S.A. 9-1711. And, Ms. Crandon's duties as general counsel unquestion-

ably included advising the commissioner in regard to his duties. The only "advice" either Mrs. Stork or Mr. Dunnick heard was Ms. Crandon's advocacy at the civil service hearing that Mrs. Stork's circumstances were neither illegal nor inappropriate.

The "Model Rules of Professional Conduct", as modified and adopted under Kansas Supreme Court Rule 226, provide for an attorney's responsibility in such a circumstance as evidenced in this case. The rules and comments, as relevant, and as follows, best speak for themselves:

> **"RULE 1.2 Scope of Representation**
>
> (a) A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue."
>
> . . .
>
> "(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."
>
> . . .
>
> "(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
>
> (e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct."

"RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with the reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

"RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) to comply with requirements of law or order of any tribunal;"

. . .

"Kansas Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal

and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter."

. . .

"The rule of client-lawyer confidentiality applies in all situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."

. . .

"Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited."

. . .

"Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in para-

graph (b)(1), the lawyer has professional discretion to reveal such information. Where practical, the lawyer should seek to dissuade the client from illegal action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule."

. . .

"The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. . . .

. . .

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer should make inquiry within the organization as indicated in Rule 1.13(b)."

. . .

"RULE 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. *Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization.* Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer shall follow Rule 1.16." (Emphasis supplied.)

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

. . .

"Comment

The Entity as the Client

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in the Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, the constituents

of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed *by a higher authority in the organization. Clear justification* should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authroity reposes elsewhere; for example, in the independent directors of a corporation. (Emphasis supplied).

Relation to Other Rules

The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, and 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole

may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity or interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case."

. . .

RULE 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

. . .

(4) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client has used the lawyer's services to perpetuate a crime or fraud;
(2) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

. . .

(5) other good cause for withdrawal exists.

. . .

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, . . ."

Simply, in other words, if Ms. Crandon's "reporting", including her encouragement to Mr. Berggren to report was, in fact, a report of issues of public concern to an agency with authority to act upon and resolve such issues raised, the steps taken by Ms. Crandon at the time and in the manner taken were clearly contrary to the Model Rules of Professional Conduct noted and did not represent even a modicum of respect for her constituent client, the state bank commissioner, and the interests, authority, duties, and concern of that agency and its officials that would be naturally raised by the subject matter of such a "report".

Further, the record presented is absolutely devoid of any reasonable or plausible justification or excuse for Ms. Crandon's failure, as such attorney, to approach, counsel, and advise her agency head client on the issue, hear his views, or determine, after such consultation, a good faith basis for her to advise him of the necessity for taking action or her intended course of conduct if such action was not taken. Apparently, in Ms. Crandon's mind's eye, Ms. Crandon convicted her organization and its head of complicity or neglect relative to the support defalcations of another employee and took the matter into her own hands, as an individual, rather than as the attorney for the organization and offices involved.

What further clearly appears from the record, or rather lack of record, is that the plaintiff arrived and proceeded on her course of conduct without more than a second hand examination of the facts (except for the referenced mortgage, car title, criminal diversion case, and the disclosure statement) and appears to have, instead of relying on her own independent investigation of the facts and consideration of the law, relied on the opinion of others to categorize the conduct of deputy commissioner Stock as wrongful or unlawful. She appears to have relied on office talk and office politics generated in reference to the Emery civil service hearing's "what's good for the goose is good for the gander" theme and, second hand, to on-goings at the Baileyville State Bank examination. Her statement of what she was told by Mr. Lamberti, counsel for the FDIC, concerning whether the "conduct" reported was unlawful differs from his, however and nevertheless, if in fact she could rely on his opinion to the exclusion of a duty of independent inquiry and decision, she, nevertheless, would have been obligated to report the full facts to Mr. Lamberti. She could not have reported the full facts because she did not know them or never made independent investigation of them. Did she know and report Deputy Commissioner Stork's historic removal from the affairs of the State Bank of Baileyville, prior to Mrs. Stork's testimony under oath? She did not know if, *in fact*, Mrs. Stork had ever examined the Southwest Bank and Trust where her husband's auto loan existed or whether, *in fact*, Mrs. Stork personally had participated in

anyway in the then ongoing examination and review of the State Bank of Baileyville. In fact, and at the time of her termination, the examination of the State Bank of Baileyville was still not final and whether or not Mrs. Stork's relatives had compromised the examination had not been determined at the examiner stage. She did not report, but there is no clear evidence proffered she knew, that Mrs. Stork had closed a checking account with the State Bank of Baileyville, apparently after Mr. Berggren and Mr. Myer, a field examiner, had raised concerns with Mrs. Stork about the propriety of such account, particularly with overdrafts. She did not know that subsequently Mrs. Stork had reported to the bank commissioner concerning Mr. Berggren's concerns. There is no evidence proffered she knew, except from what Mr. Berggren told her or as might have otherwise come out at the civil service hearing, that the bank commissioner had reviewed the situation, however, since she never talked with Mr. Dunnick except as a witness, what, in fact, he considered in such review was otherwise unknown. Thus, from a factual premise Ms. Crandon was proceeding wholly upon supposition or third party opinion only and without any semblance of complete or direct factual information. Further, she knew any conclusions expressed by Mr. Dunnick at the civil service hearing were opinions formed without any advice by her to him to the contrary, as she, not even once, as the agency attorney, discussed the situation with him, as her agency's head or, for that matter, had she ever discussed her beliefs with her apparent designated indictee to be, Mrs. Stork.

Further, indicia of a complete loss of her attorney role and mantle is evidenced by an examination of the alleged "violation" or "conduct" of Mrs. Stork in terms of the law applying to the facts of Mrs. Stork's situation.

Even cursory research would reveal that the principal statute thought to be violated, 18 U.S.C. 213, and which would be of federal concern, was not clearly applicable by authoritative construction. See, *U.S. vs. Napier*, 861 F. 2d 547 (9th Cir. 1988). This latter case, as pointed out by counsel for defendants, is annotated in the USCA edition of the federal code. See, 18 USCA 213, annotations

(5) and (10). Plaintiff has pointed to no cases to the contrary. This fact itself would lend support to Mr. Lamberti's description of his conversation with Ms. Crandon negativing any supposed violations however, considering Ms. Crandon's version as authoritative, still this case could not have been considered by her in reaching any conclusions about the course of conduct she was proceeding on.

Further and clearly, Ms. Crandon's other reference to K.S.A. 9-1701(a) as a statute violated by Mrs. Stork is a statute which substantially mirrors 18 U.S.C. 213 on the point of concern at issue. This statute, as material, and in reference to the point in issue, has historical roots that have been subject to authorative construction since 1921. In the *State, ex rel. v. Wilson*, 108 Kan. 641, 647-648 (1921), the Supreme Court construed the statute and held the state bank commissioner would not be subject to ouster for violation of the statute unless he personally examined a bank or passed on a matter in which he had a financial interest. This case is cited under the revisor of statutes annotation in K.S.A. 75-1301, a statutory section since repealed, but still annotated, referencing the state bank commissioner. Considering this case and the banking statute at issue along with the state's ethics law, K.S.A. 46-247 et seq., and under the facts displayed or at least under the facts known to Ms. Crandon at the time of her reporting, does not compel a different conclusion because a "substantial interest" disclosure had been made and no definitive evidence existed Mrs. Stork passed on or interfered with the ongoing examination of the State Bank of Baileyville which examination was not concluded at the examiner stage at the time of the reporting by Ms. Crandon. This case and the analogous circumstances existing could not, therefore, have been within the contemplation of Ms. Crandon in her manner of proceeding.

Accordingly, as a matter of law, unless Mrs. Stork had in fact proximately examined any bank at which she or her husband had loans, or subsequently and proximately obtained loans, or had interfered in, or aided and abetted in such interference, or passed upon a matter in the examination of such bank on a material matter as Deputy Commissioner, Mrs. Stork's position as Deputy Com-

missioner would not place her in violation of, or within the sanction of, any criminal or ethics statute cited by Ms. Crandon as a basis for her "report". Office scuttlebutt and intrigue should not suffice as a reasonable belief for an attorney to avoid an established manner of proceeding within her own agency or dealing forthrightly with a client. See, 1992 Kan. Ct. R. Annot. 226 at page 243, "Terminology".

Further and clearly, by reference both to Ms. Crandon's testimony, Mr. Lamberti's, and Mr. Berggren's and the lack of proffer of any other testimony, the question of Mrs. Stork's financial interest in the Baileyville bank, given her prior diversion agreement and the prohibition of 12 U.S.C. 1829 barring involvement by such a person with a financial institution is not relevant here because no evidence exists this issue was raised or brought to the attention of any outside person or Mr. Dunnick or was part of any "whistleblowing" or public concern/free speech claim. However, even if it had been, it is equally clear Ms. Crandon never determined whether, in fact, the statute applied to Mrs. Stork because Ms. Crandon did not know by investigation or otherwise, and this record does not disclose, whether the exclusionary premise to application of the statute, FDIC written permission, existed or did not exist as a matter of fact at any time precedent to the circumstances at hand. Further, in this regard, and in reference to 12 U.S.C. 1289 and Mrs. Stork's financial disclosure statement which Ms. Crandon stated she reviewed, it is to be noted Mrs. Stork held stock in a bank holding company whose interest is excluded in defining an "institution affiliated party" under 12 U.S.C. 1289(a)(1)(A)(i). See, 12 U.S.C. 1813(u). Secondly, under section (a)(1)(A)(ii) of 12 U.S.C. 1289, a question is certainly raised whether the phrase "own or control, directly or indirectly, any insured depository institution" would encompass a 4.9% share of stock in a bank holding company that owned such bank or whether the exercise of any such stock ownership rights would fall within the prohibition of 12 U.S.C. 1289(a)(1)(A)(iii)'s "otherwise participate, directly or indirectly in the conduct of the affairs of any insured depository institution". Further, this statute was, as relevant here, amended November 29,

1990, and the preexisting statute only proscribed the circumstances noted under subsection (iii) noted above. It had no provision encompassing a "diversion" as a conviction for the purpose of the statute. Thus, an open question existed whether Mrs. Stork's small and obviously not controlling interest was intended to be included by the changes to this statute. Further, 12 U.S.C. 1289 provided a legal means for avoidance of this prohibition. Further, Mrs. Stork's diversion was entered into March 10, 1982, over ten years before Ms. Crandon's concern, and over eight years before the statute was broadened in scope. (Judicial notice of appearance docket in 82 CR 234 which is the only available document from microfilmed records.) Even if the statute applied to her interest, a substantial question would exist whether the preexisting diversion was disqualifying, at least without notice and opportunity for diversiture. Such a circumstance may have called for wise counsel, but certainly the known facts would not warrant the agency's attorney condemnation and a self-anointed prosecutorial stance without her further legal inquiry and without prior advice to, consultation with, and clear refusal to act by, her constituent clients, particularly in the non-exigent circumstances then existing.

Accordingly, except perhaps for this latter circumstance which is not a part of any claim before the court, all Ms. Crandon's concerns dealt with past conduct of Mrs. Stork or present conduct that Mr. Dunnick, as the agency head and her direct employer, had authority to act upon in the ordinary course of his duties.

Accordingly, if Ms. Crandon blew a whistle, it was a whistle in the wind because it was misdirected. Further, this "whistle" was out of tune and should not command deference in this proceeding as the act of a reasonable attorney because of the lack of independent inquiry as to the facts or the law supporting it and, in fact, an established absence of acts or law to support any substance to the report or "whistleblowing" at the time it was made.

A premise to any whistleblowing claim is that a reasonable person in the shoes of a plaintiff, here an attorney, would believe a violation of law or matter of public concern existed. See, *Palmer v. Brown*, supra, at page 900. Further, the "whistleblowing" must

be made in good faith and not for a corrupt or other specious motive, *id.*

Given plaintiff's status as an attorney, her avoidance of professional duty to her clients, her assumption of agency power and authority to herself, and her rush to judgment on supposition and surmise, should suffice as both lack of good faith and good motive. It postures her claims as ones of casting blame on the mirror for her termination.

In terms of the foundation for the law applying, plaintiff's whistleblowing claims are rationally best tested by the principles of law underlying her First Amendment claim. A First Amendment claim, as well as a whistleblowing claim, arising out of the reporting by an attorney on a client should consider whether the attorney's speech or conduct, subject of the claim, was not only reasonably founded, but appropriately and procedurally necessitous given the existence of the attorney/client relationship. Additionally, if the communication should, because of the omission of duty of the attorney to his client, be considered confidential when uttered, and/or otherwise because of the lack of substance of the communication and/or the lack of consultation with the client, be seen to grossly undermine the working relationship between the client and attorney, then, on balance, first amendment status or whistleblower protection should not attach to the improper utterance. Compare, *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811 (1968); *Connick v. Myers*, 461 U.S. 138, 75 L.Ed. 2d 708 (1983); *Larson v. Ruskowitz*, supra. See also, Milbrath, *The Free Speech Rights of Public Employees: Balancing the Home Field Advantage*, 20 Ida. L. Rev. 703 (1984).

Here, particularly, not only the attorney/client relationship, but the orderly processes of government demanded a concern for the individual office holder constituent clients and the client organization itself, particularly, given the absence of any evidence of the intentional complicity of the agency head, Mr. Dunnick, with the assumed wrongdoing "reported" or some urgency to the need for prompt report. Here, it appears that not only was an attorney/client relationship neglected, but it was wholly abandoned. Here,

not only was Ms. Crandon's governmental authority and position abandoned, but in the manner of doing so, the orderly process of governmental decision making vested by law in the banking commissioner was usurped and assumed and then diverted to "outside authorities" by Ms. Crandon. And, further, such acts of abandonment and usurption by Ms. Crandon appear to have been implemented by her on but the slightest of contemplating and inquiry into either the facts or the law applying.

Were plaintiff not an attorney and/or were plaintiff's opinions not based on confidential information received as the attorney. then perhaps the First Amendment would prevent termination for the disclosure for public discussion of what, under other circumstances, might be considered existing public information because of the public Emery Civil Service hearing or an office policy of sharing bank examination information with the FDIC. See, "Plaintiff's Supplemental Memorandum" filed October 22, 1993. Also, compare, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 493-496, 43 L.Ed. 2d 328, 349-380 (1975). However, when the messenger delivering such character of information is a person trained to connect the dots displayed from public information with other facts gained from the position as a lawyer, such messenger would not seem immune from discharge by the client. Such character of "tie-in" information should still fall within principles of confidentiality. See, *Wolfram, Modern Legal Ethis* (1986), Section 6.7.4 at page 302. Also see, generally, *Wolfram*, id., sections 6.7.1-6.7.4. The discharge is permitted for the breach of a duty of confidentiality, loyalty, and destruction of the foundation for a working relationship and not necessarily or correctly based on the particular contents or substance of the message conveyed. Weighing and balancing these conflicting interests is the essence of *Pickering* and *Connick*.

Although an attorney may hold the office of a government attorney and, as such, have theoretically as the ultimate client, the citizenry of the state or public he or she serves, nevertheless, principles of ordered liberty and government coupled with the fact the government attorney is privileged to have access to matters not yet ripe for or completely within the public domain as a necessary

fulfillment of his duty of sound advice in the public interest should require the government attorney, absent clearly necessitous circumstances, to follow, rather than usurp, orderly procedures for processing her opinion. It should not be until such orderly processes have been clearly fulfilled or clearly frustrated of fulfillment and the opinion clearly discarded in favor of some continuing or future clearly unlawful conduct that he or she might be able to advise a non-client of the circumstances subject of the disregarded advice. See, Kan. Ct. R. Annot. 226, MRPC 1.13(b); MRPC 1.6(b)(1); Hazard & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, Section 1.13: 301, pages 409-410.2 (1993); 93 Law. Man. on Prof. Conduct (ABA/BNA), 51-63 (7/18/90). Otherwise, the public attorney becomes arbiter of any perceived questionable public decision and by the threat, real or implied, of public exposure may extort adherence to views not held by the client upon matters of public policy entrusted to client by the client's public position. This threat may very well diminish or usurp the assigned duties of the functionaries of government or to a very real extent create a situation whereby, at some point, the advice is no longer sought resulting in the destruction of the very purpose of the public office of attorney because of the loss, by non-use, of this source of very important advice for the honest and efficient administration of government.

Clearly, the balance of concerns, including assigning weight to the ethics of the legal profession, must weigh on the side of the defendants in this case and no justification can be had for protecting plaintiff from consequence for, or compensating plaintiff for, recklessly attempting to instigate what could be characterized, on the then knowable facts and law, as a prosecution without probable cause of, in this case, her own clients. See, *Nelson v. Miller*, 227 Kan. 271, 284-285 (1980).

A passage from *Connick v. Myers* quoted in *Larson v. Ruskowitz*, id., at page 971, applies with full force here, as well:

> "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient

fulfullment of its responsibilities to the public. One hundred years ago, the Court notes the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service.' *Ex parte Curtis*, 106 U.S., at 373. AS JUSTICE POWELL explained in his separate opinion in *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974):

"To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.' 461 U.S. at 149-51."

Accordingly, in this case, Ms. Crandon's speech was not free, but rather, at the time made was confidential, or at least subject to client consent, or minimally, subject to prior consultation with the client, and in and of itself by the very act of enunciation, subjected the speaker to the reasonable response of discharge for the very reason stated by Commissioner Dunnick, that is, by proceeding as Ms. Crandon did to take the matter out of the agency, he was embarrassed because the act of communication painted him in a light that he was not in control of or capable of administering the very agency of which he was the duly appointed and lawful head on a matter over which he had clear authority. Given the fact Mr. Dunnick had been tried and convicted of complicity or stupidity by his own attorney without nary a word said or concern raised by his attorney on questionable premises, both factually and legally, how then could the relationship of attorney and client, boss and employee, continue? Simply, it could not.

Even had Ms. Crandon reasonably perceived a problem or potential problem, what exigency or emergency required her to avoid the procedures set forth in Section 1.13(b) of the Model Rules of Professional Conduct adopted under Rule 226 of the Kansas Supreme Court which are, designedly so, aimed at providing counsel where counsel may be sorely needed and whereby the fulfillment of a lawyer's calling *and* the public interest might have yielded a perfect match. See, 1992 Kan. Ct. R. Annot. 226, MRPC 1.13(b); Giesel, *The Ethics or Employment Dilemma of In-House Counsel*, 5 Geo. J. Legal Ethics 535, 548 (Winter 1992).

Even had Ms. Crandon been 100% right in the legal assessments that the law was being violated, how can she be excused from not counseling her clients, particularly Mr. Dunnick, of what she believed the law was and what she believed needed to be done in regard to Mrs. Stork. Even if Mr. Berggren had told her or she knew from the civil service proceeding that Mr. Dunnick had reviewed the manner and found no fault with Mrs. Stork, what reasonable right did she have to believe Mr. Dunnick had made an informed decision on the law applying. Mr. Dunnick is not shown to be an attorney and no evidence exists as to his sophistication in the law. His financial statement shows his background as a country banker. What cause did he have to believe Mrs. Stork was in violation of 18 USC 213 or K.S.A. 9-1701? Was he even aware of the changes in 12 U.S.C. 1289, as noted earlier? Did he know the ramifications? For that matter, did Mrs. Stork recognize and understand the application of 12 USC 1289? Did Mr. Dunnick know all the facts regarding the alleged hostility of Mrs. Stork's relatives to the examiner's inquiries at the Baileyville State Bank? Did Mrs. Stork? Certainly Ms. Crandon did not apprise Mr. Dunnick or Mrs. Stork, yet she apparently assumed Mr. Dunnick complicit, a conspirator, a "good old boy" and rather than counsel him on his duties, she assumed them herself. She presumed Mrs. Stork guilty in the face of Mrs. Stork's under oath denials and Ms. Crandon's own open advocacy at the Emery Civil Service hearing that no laws or ethics were broken or bent. These are not the reasonable acts of an attorney toward her clients. Certainly, Mr. Dunnick could rely

on his attorney to follow the ethics of her own profession. Certainly, in the absence of advice to the contrary, he should be able to rely on his general counsel's public words. Further damaging to any claim of Ms. Crandon, however, is the clear conclusion that must be reached from this record that the facts known to Ms. Crandon or that should have been known to her at the time of her "reporting" did not reasonably, much less, "clearly, [evidence] a violation of law". See, 1992 Kan. Ct. R. Annotated 226, MRPC 1.13(c).

Lawyers occupy a unique position in society. They are required to tread where no others go to advise or defend the most vicious or the most vilified, or occasionally charge and pursue on behalf of a client a popular and/or prestigious individual or institution, not because they believe in the moral superiority of their client or the claim, but because the law loves deterrence of error or upon a finding error or in the face of a claim of error demands full representation to a fair and just legal result. Thus, the service is performed to attempt to assure justice not guarantee a result. The lawyer is not, and can not be, the jury for his client. Moral superiority is only a lawyer's mantle once the lawyer is asked to be an instrument of known or easily knowable error and has acted within his or her legal or moral competence to dissuade the conduct. See, 1992 Kan. Ct. R. Annot. 226, 1,13(b). Therefore, if appropriate at all, an act of moral superiority comes only after the good advice, not before it or as substitute for it.

Though certainly a lawyer in private practice may have the power to disassociate from certain cases and controversies, the government lawyer is generally not so completely privileged. Often, neither the client nor the controversy is substantially within the government lawyer's control. Similarly, an in-house lawyer for any organization finds similar lack of choice. Thus, avoidance, short of career change, is not a tool of these lawyers and, therefore, not only must they be mindful of their duty and function as lawyers, but also mindful of their limitations as lawyers within such organizations. Certainly, some situations will test an organization's attorney and place such attorneys on the horns of a dilemma in choosing between their professional and personal economic well being and

their very duties as lawyers that must set them aside, uniquely, as always an honest source of advice, but never a life raft, in what otherwise might be seen as a sea of skullduggery. It is the skill of the lawyer and the essence of professionalism to make his clients not only hear, but also listen to his or her advice even if the advice sets the lawyer aside as a heretic in the organization or, in the last analysis, cuts his or her own economic throat. It is not the function of a lawyer necessarily to be like or loved, but to be listened to and, at best, the advice respected. Controversy, the life blood of lawyering, rarely creates affection for advice contrary to the cause asserted or love for its messenger notwithstanding the soundness of advice. Nevertheless, it is the lawyer's duty to say what must be said even if the client then reacts against the messenger. Although the courage to speak what must be spoken is necessary for a lawyer, very important corollaries require the sense of when to speak, where to speak, to whom to speak, and what to say. Certainly, a government lawyer may have many competing interests to deal with, but the general commentary as well as the Model Rules of Professional Conduct seem to support the concept of the employing agency as the client while recognizing, nevertheless, lines of authority within it. See, *Hazard & Hodes*, id., Sections 1.13: 100-1.13-500; Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 Geo. J. Legal 291 (Fall, 1991). Ms. Crandon's apparent act to assume the mantle of determining the public good or interest by virtue of her position as the agency general counsel has been described by one commentator, in similar circumstances, as a situation in which the government lawyer "is not a lawyer representing a client, but a lawyer representing herself". See, *Cramton*, id., at page 299.

The Model Rules of Professional Conduct were enacted, in part, to aid the lawyer in the course of his or her practice, to foist the lawyer in the right direction and light the way in certain dark corridors where personal, but human concerns, might pull on the path of professionalism. They also protect the lawyer in ambiguous circumstances. Here, had Ms. Crandon followed these rules, she may have been forced, her advice ignored, to take steps which just

might have similarly placed her job in jeopardy. However, her exit would have been on the basis of an act of professionalism, her legal duties fulfilled. Though the Model Rules of Professional Conduct would direct Ms. Crandon to withdraw upon client non-compliance when the conduct advised against is criminal or fraudulent (See, 1992 Kan. Ct. R. Annot. 226, MRPC 1.13(d); MRPC 1.16(a)(4)), nevertheless, had she proceeded as an attorney is required to proceed and had her opinion rested on sound footing, her claim might have some appeal for it might be a rank injustice and a disservice to the law of lawyering and to the public for a government lawyer to be terminated or required to withdraw from her public position for doing a sound and right thing in the public interest. Compare, *Lowrey v. Board of Industrial Insurance Appeals*, 684 P.2d 678 (Wash. 1984); See also, Gillers, *Protecting Lawyers Who Just Say No*, 5 Ga. St. U.L. Rev. 1 (Fall 1988); Corello, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 Colum. L. Rev. 389 (March, 1992); O'Dell, *Retaliatory Discharge: Corporate Counsel in a Catch-22*, 44 Ala. L. Rev. 573 (Winter, 1993); Kim, *In-House Counsel's Wrongful Discharge Action Under the Public Policy Exception and Retaliatory Discharge Doctrine*, 67 Wash. L. Rev. 893 (October, 1992); Wilbur, *Wrongful Discharge of Attorneys: A Cause of Action for To Further Professional Responsibility*, 92 Dick. L. Rev. 777 (July, 1988); Moskowitz, *Employment-at-Will & Codes of Ethics: The Professional's Dilemma*, 23 Val. U.L. Rev. 33, 56 (Fall 1988); Giesel, *The Ethics or Employment Dilemma of In-House Counsel*, id.

However, here, is not such a case.

Though certainly the Model Rules of Professional Conduct adopted pursuant to Supreme Court Rule 226 are not, ipso facto, a bar to Ms. Crandon's lawsuit and expressly are declared not to be (See, 1992 Kan. Ct. R. Annot. 226, at page 242), nevertheless, where an attorney's asserted causes of action of whistleblowing and free speech violations necessarily find their genesis in support of public policy and/or rights to speak to matters of public concern, their efficacy necessarily rests in balancing right with responsibility in determining the substance of the claims. As such, the Model

Rules of Professional Conduct, as they guide the advancement of the rule of law, should be given substantial weight in assessing whether the plaintiff's claims are proper instruments to the fulfillment of public policy.

Examination of the cases advanced by both sides in this controversy clearly establish that the wellspring of Ms. Crandon's claims are significantly diminished as instruments of sound public policy because of Ms. Crandon's avoidance of the tenets and procedures of her own profession and the resulting avoidance and disrespect to the governmental authority and responsibility of her clients, not as individuals, but as public office holders. The cases pointed to by her to support her claims relate to plaintiffs who, if successful, were successful because the exercise of their fundamental private rights or opinions or their disclosures were not, when measured and balanced, in real conflict with their public or private employment duties and/or their acts entailed doing what the law reasonably required or permitted of any citizen. Their employment position did not truly impede on their rights asserted as citizens or professionals. See, *Pickering v. Board of Education*, supra; *Kurowski vs. Krajewski*, 848 F.2d 767 (7th Cir. 1988); *Johnston v. Koppes*, 850 F.2d 594 (9th Cir. 1988); *Savage v. Com. of Pennsylvania*, 475 F.Supp. 524 (E.D. Pa. 1979); *Grossman v. Schwarz*, 678 F. Supp. 440 (S.D.N.Y. 1988); *Hirsch v. Green*, 368 F. Supp. 1061 (D.Md. 1973); *Kuchka v. Kile*, 634 F.Supp. 502, 512 (M.D. Pa. 1985); *Young v. Marin County*, 241 Cal. Rtr. 169 (1987).

However, where the right asserted significantly impaired or impeached the public function and/or the working relationship, termination was permitted. See, *Connick v. Myers*, supra; *Montaquila v. St. Cyr*, 433 A.2d 206 (R.I. 1981); *Jafree v. Scott*, 372 F.Supp. 264 (N.D.Ill. E.D. 1974), aff. in part, rev. in part, 519 F.2d 1405 (7th Cir. 1975); *Sprague v. Fitzpatrick*, 546 F.2d 560 (Third Cir. 1976).

As legal commentary, supported by judicial decision has pointed out, certain factors that may arise from the employment relationship tend to weight the balance of the claim of protected speech versus the government interest in favor of the government

employer. See, *Milbrath*, supra, 20 Ida. L. Rev. at pages 712-720; *Pickering v. Board of Education*, supra, 20 L.Ed 2d at page 818, note 3. These factors are expressed as follows:

> "1) The employee's false accusations may be difficult for the employer to counter due to the employee's position and his presumed access to the real facts.
>
> 2) The employer's need to maintain discipline or harmony among co-workers.
>
> 3) The employee's statements may impede the employee's proper performance of his daily duties and the employer's efficiency.
>
> 4) The employee's statements may be so without foundation as to call into question the employee's competency to perform the job.
>
> 5) The employee's position may require confidentiality.
>
> 6) A close and personal working relationship which calls for personal loyalty and confidence may be required between the employee and supervisor."

Milbrath, id., page 712.

Here, Ms. Crandon was not really in the position, at the time in question, to exercise private rights of expression, but rather her claimed right of expression emanated directly from her supposed public duties to provide legal advice in aid of the proper administration of the banking laws. Not only the substance of her asserted expressions, but her ability to make them were gained from the very public position held as general counsel and, as noted, was made not only by abandonment of her public duty of giving advice to Mr. Dunnick her agency head, but may be seen, by its ad hoc, out of school, manner of disclosure, as in controvention of the

promulgated standards of her profession. This assumption of course and conduct on the part of Ms. Crandon was not only disabling to the proper operation of her agency, but fundamentally in avoidance of the official reason for her position as attorney. Coming from the general counsel of the agency her "report" likewise carried the power, prestige, and credibility of that office and implied her agency head constituent client was non-responsive to her concerns. Further, the "report" was almost casual in terms of any studied thought or independent investigation into its validity or legal premise. It naturally impacted concepts of attorney client relationships founded in fidelity, and fourth-rightness, not only by the fact of disclosure, but more importantly, by the fact of disclosure without prior consultation. Certainly, it blindsided Mr. Dunnick and left Mr. Dunnick in a defensive position and one of embarrassment since it was he, not Ms. Crandon, that was appointed by the Governor and confirmed by the State Senate to run this agency.

Without some existing exigency, there is no discernable public policy advanced by permitting a lawyer terminated under such circumstances to advance a private lawsuit based on her own avoidance of public and professional duties, particularly on questionable premises. The procedures established by MRPC 1.13(b) clearly provide an authoritative means in the first instance to focus on the relationship and hopefully avoid unnecessary disruption or misunderstandings. None of the legal commentators noted supra proffer a case that holds, or advocates, that a lawyer *acting in violation* of an ethics code should be protected from discharge. Kansas' adoption of a less stringent test for the subject matter circumstances permitting disclosure than advanced by the original Model Rules of Professional Conduct (See, 1992 Kan. Ct. R. Annot. 226, MRPC 1.13(c); id., 1.6 (b)(1); Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Disclosure*, 1 Geo. J. Legal Ethics 289, 302-306 (Fall 1987) does nothing to alter the procedures to be followed precedent to disclosure. Again, the legal commentators favoring more liberal disclosure duties or that advocate remedies to the disclosing attorney subsequent, do not assail the Rule 1.13(b) procedure, e.g. *Gillers*, both supra. Ms. Crandon's

position, by example, is unlike that evidenced in *Parker v. M & T Chemicals, Inc.*, 566 A.2d 215 (N.J. Super, A.D. 1989), whereby the discharged attorney there permitted to sue, was acting in accordance with the code of ethics. See also, *Mourad v. Automobile Club Ins. Ass'n.*, 465 N.W. 2d 395 (Mich. Ct. App. 1991); *Lowry v. Board of Industrial Insurance Appeals*, supra.

The cases noted by these legal commentators as generating their premise for a change in the law had permitted termination notwithstanding compliance with professional standards or good advice. Compare, *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991); *Nordling v. Northern States Power Co.*, 465 N.W.2d 81 (Minn. App. 1991), rev. on appeal, 478 N.W. 2d 498 (Minn. Ap. Ct. 1991); *Willy v. Coastal Corporation*, 647 F.Supp. 116 (S.D. Tex. 1986), reversed on other grounds, 855 F.2d 1160 (1988); *Herbster v. North American Co.*, 501 N.E.2d 343 (Ill. 1986). Generally see, *Corello*, id., pages 399-400, notes 53-55.

The balancing of Ms. Crandon's interests under the First Amendment when weighed with her non-compliance with the tenets of her profession and the interest of the State of Kansas in properly assuring the fulfillment of the proper duties of the general counsel for the agency as well as the duties of the state bank commissioner to administer his office in the first instance, require Ms. Crandon's claims to be dismissed under the principles of law announced in *Connick v. Myers*, supra, and *Pickering v. Board of Education*, supra.

Mr. Dunnick was well within his discretion to end a public and professional relationship Ms. Crandon had completely and inappropriately destroyed without fear of legal recourse by Ms. Crandon. The fact he was angry, as Ms. Crandon alleges, at the time of his termination of her adds nothing to her claim. His anger would be explicable.

For the above reasons alone, the defendants' motion for summary judgment should be sustained. However, it is further clear that a qualified immunity should attach to the defendants for their actions which plaintiff can not overcome by the facts of record. Objectively, and by virtue of the cases noted, no reasonable agency

head would know termination of his agency's general counsel under these circumstances could or would be clearly constitutionally proscribed by any preexisting declaration of law. See, *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed. 2d 572 (1982).

As such, the defendants have established a good faith immunity from the consequences of this discretionary act under a 42 U.S.C. 1983 claim.

Further, the state of Kansas and the State Banking Board and the state bank commissioner, as state officials, would have been, but for their qualified immunity, immune from damages under 42 U.S.C. 1983 except for prospective relief arising as a result of an order of reinstatement including attorney's fees. See, *Pulliam v. Allen*, 466 U.S. 522, 80 L.Ed. 2d 565 (1984); *Missouri v. Jenkins*, 491 U.S. 274, 105 L.Ed. 2d 229 (1989); *Will v. Michigan Dept. of State Police*, 429 U.S. 58, 105 L.Ed. 2d 45 (1989). Even were plaintiff to have been successful, reinstatement would seem a particularly inappropriate remedy to the efficient administration of this government agency with Mr. Dunnick as its head.

Clearly, here, as well, the State Banking Board has been shown to have no authority whatsoever over plaintiff's termination or the State Bank Commissioner's exercise of authority in this regard. Thus, the State Banking Board, improperly captioned as the State Banking Commission, should be dismissed as a defendant for plaintiff's failure to establish any claim against this named defendant whatsoever. (See, this Opinion, supra, at page 12.)

Further, the provisions of K.S.A. 75-2973, the state employee "whistleblower" statute, do not negate the considerations heretofore stated and provide Ms. Crandon with a cause of action. Although the statute specifically prohibits a reporting to any supervisor as a precondition for suit under this statute (See, K.S.A. 75-2973(b)(2)), nevertheless, no reasonable attorney employee, standing in plaintiff's shoes as general counsel, could perceive the conduct of the defendants as a basis for any out of agency report at the time it was made. In other words, plaintiff reasonably had then no whistle to blow and, in fact, recklessly abandoned her duties as general counsel and disclosed information which a reason-

head would know termination of his agency's general counsel under these circumstances could or would be clearly constitutionally proscribed by any preexisting declaration of law. See, *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed. 2d 572 (1982).

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able attorney plaintiff in Ms. Crandon's shoes, both factually and legally, would have had no basis to then credit (K.S.A. 75-2973(c)(4)(A)) and/or she otherwise disclosed information which was at the time of the "report" confidential pursuant to 1.6(a) and 1.13(b) of the Model Rules of Professional Conduct as reflected by Supreme Court Rule 226. Accordingly, until the procedures and circumstances required by Rule 226 were otherwise exhausted or shown to be ineffectual or otherwise inapplicable, Ms. Crandon, as general counsel, certainly had neither duty nor privilege to disclose. Likewise, the information gained principally from her role of general counsel emanated, in part, from a bank examination and was confidential without the commissioner's approval. See, K.S.A. 9-1712. In either case, no grounds to excuse the duty of confidentiality exist because plaintiff took no steps a person, particularly, an attorney, must take to make such disclosures proper nor did exigent circumstances exist that might be seen to excuse such preconditions to a confidentiality waiver for such a character of reporting.

Although at least one commentator has questioned whether under the comparable federal whistleblower act, the Model Rules of Professional Conduct's confidentiality rules would suffice to meet that act's exemption for disclosures of information "prohibited by law" (See, *Cramton*, supra, 5 Geo. J. L. Ethics, at pages 307-315), it would appear in Kansas that Rule 226 of the Kansas Supreme Court, adopting, as modified, the Model Rules of Professional Conduct would have the force and effect of law. See, K.S.A. 7-103; K.S.A. 7-111; *State v. Schumacher*, 210 Kan. 377, 382 (1972). Also compare, *Harder v. Kansas Comm'n on Civil Rights*, 225 Kan. 556, 559 (1979). Therefore, the phrase in K.S.A. 75-2973(c)(4)(C) "is confidential under any other provision of law" should reasonably encompass the confidentiality requirements and procedures of the Model Rules of Professional Conduct adopted by Kansas Supreme Court Rule 226 and as herein noted.

Likewise, since at least the confirming source of at least some of Mrs. Stork's loans (overdrafts) derived from the examination of a state chartered bank, this information remained confidential without the bank commissioner's approval. See, K.S.A. 9-1712. As

such, it would be material not subject to the Kansas Open Records Act and thus its disclosure would not permit a suit based thereon under K.S.A. 75-2973. See, K.S.A. 45-221(a)(1); K.S.A. 75-2973(c)(4)(B).

Further, by enactment of K.S.A. 75-2973, the legislature has sufficiently defined the parameters of a state employee whistleblower's remedy beyond which no state common law derived cause of action would probably lie. Comparably, *Polson v. Davis*, 895 F.2d 705 (10th Cir. 1990).

Finally, in conclusion, the court would note that the necessity of treating Ms. Crandon's conversations or sponsored conversations with the FDIC as a report (by Ms. Crandon's adament assertion of intent to report) perhaps paints Ms. Crandon's actions as more aggressively intended than perhaps the reality was, however, any scenario less whereby her "report" was not intended as a "report" in the whistleblowing sense eliminates any specie of claim by her whatsoever. If as plaintiff argues, the subject matter of the "report" was a matter of public record and not confidential and such reporting was a matter of common office practice, then a "report" and the "public concern" speech or whistleblowing aspect of plaintiff's claims similarly disappear. Under this set of facts representing lesser scenarios than here assessed, the issue then raised by her termination becomes purely one of not following office protocol by not informing Mr. Dunnick first and for which act Mr. Dunnick had clear authority to fire Ms. Crandon for this deviation, real or perceived, actual or mistaken, fairly or unfairly, since Ms. Crandon was an "at will" employee in the state unclassified service.

ENTRY OF JUDGMENT

For the reasons stated in the above Memorandum Opinion, judgment is entered for each of the above defendants and against the plaintiff on all of plaintiff's claims. Costs are taxed to the plaintiff.

This entry of judgment shall constitute the Court's entry of judgment when filed with the Clerk of this Court and no further journal entry is required.

SO ORDERED, this 27th day of December, 1993.

/s/_____
Franklin R. Theis
District Judge

Supreme Court, U.S.
FILED
JAN 16 1996
CLERK

No. 95-849

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

Joyce H. Crandon, Petitioner
vs.
Frankie D. Dunnick
(former) Commissioner of the Kansas Banking Commission,
Individually, Respondent

On Petition For Writ of Certiorari
To the Supreme Court
of the United States

Petitioner's Reply to Respondents Brief in Opposition to

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a special assistant attorney general employed by the State of Kansas, Banking Commission as General Counsel can be fired for exercising of her First Amendment rights of Freedom of Speech, where she inquires about federal law and policy to the Regional General Counsel of the Federal Deposit Insurance Corporation [FDIC]?

Whether all attorneys lose their First Amendment right to freedom of speech when they accept employment for the State of Kansas?

Whether the Kansas Supreme Court erred in affirming the district court's granting summary judgment when there were disputed material facts?

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STATUTES

U. S. Constitution, First Amendment:
42 U.S.C. §1983. Civil action for deprivation of rights
42 U.S.C. §1988. Proceedings in vindication of civil rights
18 U.S.C. § 213
28 U.S.C. § 1257

STATUTE INVOLVED

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . . any right is specially set up or claimed under the Constitution or authority exercised under the United States.

42 U.S.C. § 1983. Civil action for deprivation or deprivation of rights

Every person who, under color of . . . . any State, . . . subjects, any citizen of the United States. . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IURISDICTIONAL STATEMENT

Petitioner submits herewith the jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

The jurisdiction of this court is invoked under the provisions of 28 U.S.C. §1257.

28 U.S.C. § 1257. State courts; certiorari

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deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The statutory provision conferring jurisdiction on appeal: This appeal is taken pursuant to U.S.C. 28 §1257.

This case involves a federal question involving 42 U.S.C. §1983. A federal question in a civil action for deprivation of civil constitutional right of freedom of speech. In that Dunnick, Respondent, Kansas Bank Commissioner under color of state law caused a citizen of the United States to wit: Crandon, Petitioner, former General Counsel to the Kansas Banking Department and special assistant Attorney General of the State of Kansas, to be deprived of her rights and privileges secured by the United States Constitution i.e. her right to Freedom of Speech under the First Amendment in violation of the Federal Constitution and 42 U.S.C. § 1983.

IN THE SUPREME COURT
OF THE UNITED STATES

Joyce H. Crandon, Petitioner
vs.

Frankie D. Dunnick,
(former) Commissioner of the
Kansas Banking Commission,
Individually, Respondent

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Joyce H. Crandon, the petitioner herein, prays that a writ of certiorari issue to review the summary judgment of the Supreme Court of the State of Kansas.

RULES OF PROFESSIONAL RESPONSIBILITY

Important to this case is the fact; that Dunnick, after receiving the trial courts summary judgment, filed a complaint against Crandon with the Kansas Attorney Disciplinary Administrator. That office conducted a through investigation into the allegations against Crandon and found that Crandon had not violated any of the Model Rules of Professional Responsibility for Attorneys. The complaint was dismissed. Specifically that tribunal found that Deputy Commissioner Stork was not the client of the Petitioner. Crandon was hired to represent the State of Kansas as special assistant attorney general not Deputy Commissioner Stork or the Respondent personally.

The Kansas Attorney General is representing the State of Kansas and the Respondent is his individual capacity in this matter: the State of Kansas apparently waives the sovereign immunity of the 11th Amendment in the federal civil rights action under 42 U.S.C. § 1983.

The summary judgment of the Kansas Supreme Court puts the government attorney in an impossible position; unable to inquire from co-regulators for fear of ethical

problems; yet fearful of violating the broader public interest/public trust concept. The Kansas Supreme Court then did not allow a trial to determine the true facts.

DISPUTED MATERIAL FACTS

Petitioner agrees with the Respondent that there are disputed material facts in this federal civil rights cause of action in which the Supreme Court of the State of Kansas granted summary judgment: and therefore summary judgment should not have been granted.

At the time that the Petitioner was employed as General Counsel to the Kansas Banking Department it was the policy and rule of that department, that no one employed for that department was allowed to have loans at state-chartered banks in Kansas. [Crandon deposition–Dunnick deposition exhibit].

As part of the review and research of the matter, Crandon telephoned Regional General Counsel of the FDIC Lamberti, in June, 1992, to inquire about federal law, federal regulations, and related policies regarding extensions of credit to bank examiners and their spouses. [Crandon deposition p. 232.]

Petitioner was performing her duty to the State of Kansas Banking Commission by doing legal research concerning controversial issues surrounding a high-ranking government official, at the request of Review Examiner Berggren. Review Examiner Berggren was performing his duty to the Banking Commission of the State of Kansas by investigating the matter of the loans of a high-ranking government official.

The Petitioner's subpoenaed bank examination records of the Southwest Bank & Trust corroborated that Deputy Commissioner Stork has examined the Southwest Bank & Trust. [Crandon deposition subpoenaed documents]. Crandon testified that she knew that Stork had examined that bank. [Crandon deposition]. Berggren knew that she had examined the Southwest Bank & Trust. [Berggren deposition and exhibits]. This disputed fact is material to this case.

Review Examiner Berggren was removed as Review Examiner of the Baileyville Bank examination, in retaliation for his investigation of the Stork loans. Berggren was afraid

that he was going to get fired also. [Berggren deposition and exhibit # 55 and Stover deposition, Myers deposition].

When Petitioner made inquiries about the Stork loans, the FDIC attorney stated that it sounded like something that needed to be investigated. [Crandon deposition and Lamberti deposition].

Important to the facts of this case was the fact that a bank examiner employed with the Kansas Banking Commission; Examiner Emery was being prosecuted in federal district court in Wichita, Kansas for a violation of 18 U.S.C. 213. She pled guilty to a violation of 18 U.S.C. 214 and was fired from her job. [Petitioner's discovery subpoenaed transcript of Emery hearing].

Crandon was General Counsel to a state agency, she had no duty to give legal advice to high-ranking governmental officials about their private business.

It is uncontroverted that one of Crandon's primary job duties was to "give legal advice and counsel to Review Examiners at the Kansas Banking Commission". [Dunnick deposition p. 2. exhibits] In reviewing the matter, Crandon consulted statutes, regulations and relevant cases. [Crandon deposition p. 350.] In addition, she obtained copies of Stork's home mortgage, auto registration,[1] and other information which confirmed the existence of loans. Crandon knew that Deputy Commissioner Stork had examined the Southwest Bank and Trust. [Crandon deposition p. 260.] The fact that Deputy Commissioner Stork had examined the Southwest Bank and Trust was not ever denied by Respondent during discovery. The evidence verifies and collaborates that Deputy Commission Stork did exam the Southwest Bank & Trust. [Crandon subpeoaned documents--Southwest Bank & Trust bank examinations].

Petitioner was making inquiries about federal laws, regulations and ethics policies from a co-regulator of state-chartered banks in Kansas. Petitioner gave no legal opinion to the FDIC. [Lamberti deposition].

Crandon tried to discuss the matter of the Stork loans with Dunnick. He harshly responded, "don't mention Judi

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1 All a matter of public record in the State of Kansas.

[Deputy Commissioner Stork], I've taken care of that." He stated that, "I know you've been talking to Eric [Review Examiner Berggren], I want you to know that no one goes over my head to the FDIC–it makes me look like I don't know what's going on." [Crandon deposition p. 2 exhibit notes.]

Dunnick then stated angrily "that if Crandon 'did anything' about this; that he knew people, had 'connections' and would 'make it hard on her' [Crandon]". Dunnick repeated twice; that if Crandon 'did anything' about the termination, she would "regret it." [Crandon deposition p. 2 exhibit notes.]

The Respondent stated that there was no evidence that Petitioner had done any reporting to the FDIC. [Lamberti deposition]. The FDIC attorney Lamberti stated that there was no reporting. [Lamberti deposition].

Respondent had no authority with the U.S. Justice Department. The State Bank Commissioner does not have authority to act on violations of federal law. When state bank examiner Emery was arrested and charged with a violation of 18 U.S.C. 213 the state bank commissioner was not notified by the U.S. Justice Department that they were going to file charges against Examiner Emery.

Petitioner performed a through complete review of the facts as it related to the Stork loans.

AUTHORITIES AND ARGUMENT

Respondent states at p. 8 "Petitioner cannot find solace in Waters v. Churchill, 511 U.S.____, 128 L.Ed. 2d 686, 114 S.Ct. 1878 (1994). The opinion is a plurality and, therefore, has no precedential value. Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L. Ed 2d 230 (1977). citing, Gregg v. Georgia, 428 U.S. 153, 169, n. 15. 49 L.Ed 2d 859, 96 S.Ct. 2909 (1976)."

The United States Supreme Court did not rule in Mark and Gregg Id. that a plurality opinion of the U.S. Supreme Court has no precedential value.

Further, Petitioner is not seeking solace–she is seeking justice.

SUMMARY JUDGMENT

The Supreme Court ruled in Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed. 2d 458:

> Summary judgment is authorized only where moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and where no general issue remains for trial; purpose of the rule is not to cut litigants off from their right of trial by jury if they have issue to try.

In the instant case both the Petitioner and the Respondent agree that there are disputed material facts. The Kansas Supreme Court has granted summary judgment on a claim in the Kansas state court alleging a violation of a federal law and the First Amendment to the federal constitution.

In Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 26 L. Ed. 2d 142; another cause of action alleging a violation of 42 U.S.C. § 1983 the Supreme Court ruled as to the issue of summary judgment,

> Summary Judgment for defendant store owner in civil rights action by plaintiff who alleged that she had been denied service because she was in company of Negroes, that there had been policeman in store restaurant, and that she was arrested for vagrancy while leaving, was improper where defendant's showing did not foreclose possibility that there was policeman in store while plaintiff was awaiting service and that this policeman reached understanding with some employee that plaintiff not be served.

In another civil rights case involving 42 U.S.C. § 1983 alleging violations of a citizens First Amendment case Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570, the Supreme Court ruled:

> In action by junior college professor attacking nonrenewal of his contract, professor's allegations that decision not to rehire him was based on his public criticism of the regents presented bona fide constitutional claim, precluding summary judgment. unnecessary abridgment of right of free speech.

CONCLUSION

Crandon has come forward with a prima facia case sufficient to be entitled to present her case to a jury.

Crandon has demonstrated that there the Kansas Supreme Court affirmed the district's court summary judgment based on an opinion that conflicts with Waters v. Churchill, 114 S. Ct. 1878, 128 L.Ed. 2d 686, ____ U.S. ___(1994) and Connick v. Myers, 461 U.S. 138, 142, 103 S. Ct. 1684, 1687, 75 L.Ed. 2d 708 (1983).

Additionally the plaintiff has demonstrated that summary judgment was granted based on disputed material facts. Only a trial to a jury will bring out all the facts in this important case for all attorneys in government service.

For the foregoing reasons this petition for writ of certiorari should be granted. Or the matter be remanded for a trial by jury to determine the facts and the law as it relates to the facts of the matter.

Respectfully submitted

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